Supreme Court, U.S.
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No.

# In the Supreme Court of the United States

GLOBAL MINERALS & METALS CORP. AND R. DAVID CAMPBELL,

*Petitioners*,

v.

VIACOM INC., AS SUCCESSOR BY MERGER TO CBS CORP. (F/K/A WESTINGHOUSE ELECTRIC CORP.), EMERSON ELECTRIC CO. AND OCEAN VIEW CAPITAL, INC.,

*Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Unlike some statutes, which create an unlimited class of plaintiffs and claims, the antitrust laws do not. "Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property." *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 477 (1982). Nor did Congress "intend the antitrust laws to provide a remedy in damages for all injured that might conceivably be traced to an antitrust violation." *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 264 n.14 (1972).

In light of these principles, this Court has carefully crafted strict and absolute limitations on who may bring an action to seek relief under the antitrust laws. *See Kansas v. UtiliCorp United, Inc.*, 497 U.S. 199 (1990); *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983); *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). In the decision below, however, the United States Court of Appeals for the Seventh Circuit did not apply the standing rules that were developed by this Court to enforce these limitations. The Court of Appeals was confronted with an alleged six-year manipulation of the price of copper futures contracts on the London Metal Exchange in the United Kingdom and alleged injuries caused by the ripple effect that these prices purportedly had on futures prices in the United States and then on domestic prices for physical copper products. Relying on the assertion that respondents paid prices that were based on copper futures prices established on the Comex exchange in New York, the Court of Appeals created an exception to the direct purchaser requirement and did not engage in a rigorous analysis to determine whether respondents' alleged injuries were sufficiently direct.

Thus, petitioners respectfully request that certiorari be granted on the following question:

When respondents did not purchase any physical copper products from petitioners, and when the price paid for such products by respondents was a function of transaction-by-transaction negotiations that took into account numerous factors in addition to Comex futures prices, whether the decision of the Court of Appeals conferring standing upon respondents conflicts with and undermines the antitrust standing rules established by this Court?

## PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner Global Minerals & Metals Corp. ("Global") is a New York Corporation. No publicly held company owns 10 percent or more of Global's stock.

The other defendants-appellees who were party to the underlying proceeding are Sumitomo Corporation and Sumitomo Corporation of America (collectively, "Sumitomo"), J.P. Morgan & Co., Inc. and Morgan Guaranty Trust Co. (collectively, "JPMorgan Chase & Co."), and Credit Lyonnais Rouse, Ltd. ("CLR"). Petitioners have been advised that each of these defendants-appellees intends to file their own petition for a writ of certiorari concurrently herewith.

The respondents are Viacom, Inc., as successor by merger to CBS Corp. (formerly known as Westinghouse Electric Corp.); Emerson Electric Co.; and Ocean View Capital, Inc., formerly known as Triangle Wire and Cable, Inc. The respondents were plaintiffs-appellants in the underlying proceeding.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioners Global Minerals & Metals Corp. and R. David Campbell, its president (collectively, "Global"), respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit (the "Court of Appeals").

## OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, 1a-55a) is reported at 306 F.3d 469. The Court of Appeals addressed appeals from three different orders, two of which are the subject of this petition. Those two orders granted motions for summary judgment against respondents Viacom, Inc. ("Viacom") and Emerson Electric Co. ("Emerson") (App., *infra*, 56a-101a),[1] and respondent Ocean View Capital, Inc. ("Ocean View") (App., *infra*, 102a-138a).[2]

## JURISDICTION

The Court of Appeals' decision was entered on September 20, 2002. Global filed a timely petition for rehearing and/or rehearing *en banc* on October 4, 2002. The Court of Appeals denied Global's petition on January 30, 2003. App., *infra*, 139a-140a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

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[1] The appeal by Viacom and Emerson was denominated No. 01-3485. The district court's decision from which they appealed is not reported.

[2] The appeals by Ocean View were denominated Nos. 01-3229 and 01-3230. The district court's decision from which it appealed is reported at 153 F. Supp. 2d 996. Petitioner Campbell is a defendant only in that action and, hence, petitions this Court only as to that action.

## STATUTES INVOLVED

Section 4 of the Clayton Act, 15 U.S.C. §15(a), provides, in relevant part:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

## STATEMENT OF THE CASE

The Court of Appeals' decision constitutes a fundamental attack on the antitrust standing doctrines established by this Court, as it authorizes respondents to proceed with their antitrust price-fixing claims despite the fact that respondents are indisputably indirect purchasers and seek relief based on a theory of causation that leaves any injury that they may have suffered far too speculative and remote from Global's alleged misconduct. *See Kansas v. UtiliCorp United, Inc.*, 497 U.S. 199 (1990); *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983) ("*AGC*"); *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). The Court of Appeals' decision adopts the view of the *Illinois Brick* and *UtiliCorp* dissents that there must always be a plaintiff, in spite of the cost to the judicial system and to a defendant.

Under *Illinois Brick* and its progeny, the only parties that have standing to bring federal antitrust claims here are (i) parties who purchased physical copper from either Global or Sumitomo (both of whom participated in the physical copper market during the time of the alleged conspiracy); and (ii) certain parties who traded futures contracts for copper. Anyone else is an indirect purchaser that cannot seek relief. Despite the unambiguous nature of this Court's decisions, the Court of Appeals crafted a broad market-index exception to *Illinois Brick*. In doing so, the Court of Appeals disregarded this Court's holding in *UtiliCorp* (which overruled an earlier attempt by the Seventh Circuit to create an exception) -- there are no exceptions to *Illinois Brick*, even in "meritorious circumstances" in which the risk of duplicative recovery is slight. *UtiliCorp*, 497 U.S. at 216.

The adoption of a market-index exception is a dramatic departure from the "indirect purchaser" rule, as it confers standing on purchasers who bought from entities that did not operate in the same market, let alone at the same level of the distribution chain. This deviation from *Illinois Brick* invites numerous exceptions to *Illinois Brick* and the ultimate erosion of this critical standing rule.

As a practical matter, the market-index exception swallows the *Illinois Brick* rule, as it allows any plaintiff who references its purchase price to an index to bypass *Illinois Brick* altogether, no matter where in the chain of distribution it is situated, while at the same time denying the defendant the right to assert a pass-on defense. Thus, the Court of Appeals eviscerated the concept of mutuality embodied in the *Hanover Shoe/Illinois Brick* dichotomy,[3] thereby exposing a defendant

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[3] The Court's *Illinois Brick* decision built on its decision in *Hanover* (continued...)

to ruinous liability far in excess of that necessary to promote deterrence. The decision thus has potentially draconian consequences that will stifle competition and commerce, including legitimate hedging activities in the future markets. The decision will compel the district court to engage in the costly exercise of identifying and quantifying respondents' injuries, which this Court previously held was futile, counterproductive and antithetical to promoting competition.

Relying on its decision in *Sanner v. Board of Trade*, 62 F.3d 918 (7th Cir. 1995), the Court of Appeals refused to engage in the rigorous standing analysis dictated by *AGC*. Instead, the Court of Appeals found respondents' alleged injury to be caused directly by petitioners' conduct simply because respondents referred to futures prices established on the New York-based Comex division of the New York Mercantile Exchange ("Comex"). This approach effectively guts the antitrust standing requirements established in *AGC*. In addition, this approach is based on a substantial misreading of *Sanner*. As Judge Cudahy, the author of *Sanner*, observed in his concurrence that criticized the majority decision, if allowed to stand, the decision would enable antitrust plaintiffs to utilize mere slogans (as opposed to concrete facts) to satisfy *AGC*'s standing requirements.

## FACTUAL BACKGROUND

Viacom, Emerson and Ocean View are purchasers of physical copper. They brought claims pursuant to Section 4 of the Clayton Act, seeking treble damages for overcharges purportedly paid in connection with their purchases of

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(...continued)

*Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), in which the Court held that a defendant could not assert a pass-on defense.

physical copper as a result of an alleged six-year price-fixing conspiracy involving Sumitomo, Global and others.

Respondents do not allege that they purchased copper from Global or any of the alleged co-conspirators, nor that they traded on any allegedly manipulated exchange. Rather, according to respondents, Global conspired with Sumitomo to manipulate prices on the London Metal Exchange ("LME"). Under respondents' theory of causation, as a result of a series of complex market interactions, the manipulated LME prices allegedly caused copper futures prices on the Comex to rise, which thereupon increased the price respondents ultimately paid for the physical copper purchased from third parties.

Although respondents alleged that the link to the prices that they paid was that simple, the undisputed record did not support that claim. Westinghouse purchased and resold copper cathode as a copper merchant, and bought copper on a revolving basis from various integrated copper-producing companies. Westinghouse did not purchase the copper pursuant to any formula. Rather, the price was based on: (i) (a) the monthly average Comex settlement price at the time of purchase, (b) a Comex spot price at the time of purchase or (c) a fixed price based on the Comex price at the time of delivery; and (ii) a negotiated premium or discount from the Comex price. Westinghouse's contracts also gave Westinghouse the option of disregarding Comex prices when it believed that such prices did not reflect market conditions. App., *infra*, 75a. Emerson bought copper magnet wire, which is made from cathode. Emerson determined the price that it paid via a forward pricing program, whereunder the price was a function of the exercise of its discretion in pricing its purchases any time during the two years preceding the

actual month of purchase.[4] *Id.* at 75a-76a. Ocean View purchased copper rod (which is made from copper cathode) from integrated producers, trading companies and semi-fabricators.[5] App., *infra*, 109a.

The copper products that respondents purchased cannot be traced or identified as "virgin" copper, the term that the Court of Appeals used in its decision. Respondents' suppliers purchased copper (such as copper cathode, concentrate, blister, anode and scrap) from third parties to manufacture the copper sold to respondents and also acquired significant amounts of copper cathode that they resold to respondents. As a result, it is not possible to determine the source of the copper that respondents purchased. Moreover, all of these suppliers paid prices that also made reference to, in some manner, the Comex futures price.

## PROCEEDINGS BELOW

### A. The District Court Proceedings

On December 13, 1999, the Judicial Panel for Multi-District Litigation consolidated various actions, including the two actions brought collectively by respondents, before the

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[4] Emerson exercised that discretion based on a variety of factors and market information, including its projections for its copper needs and its judgment as to copper market prices and demand.

[5] Ocean View did not come forward with any documentation that could identify the source of any copper cathode that it purchased. App., *infra*, 129a, 132a-133a.

United States District Court for the Western District of Wisconsin.[6]

Viacom and Emerson filed their complaint in the Western District of Wisconsin, and subsequently amended it. Global and the other defendants unsuccessfully moved to dismiss on the ground that Viacom and Emerson each lacked antitrust standing. The district court accepted the amended complaint's allegations that the price of physical copper was dictated by LME and Comex prices, and "assumed for the purpose of that decision that plaintiffs had bought copper cathode from the copper extractor so that their claims would not duplicate those of other purchasers of copper." App., *infra*, 86a. The district court held that the claims survived under an umbrella standing theory, and reasoned that it was not obvious from the complaint that respondents bought copper at distant levels of distribution. The district court also predicted that petitioners might learn through discovery what form or grade of copper respondents purchased.

Ocean View's complaint was filed in the United States District Court for the Southern District of New York. The complaint was subsequently amended. Ocean View later filed a second complaint, adding JPMorgan Chase as a defendant. Global and the other defendants moved to dismiss on the ground that Ocean View lacked antitrust standing. The district court denied the motions, and observed that Ocean View was not claiming "injuries . . . passed on from one injured person or entity," and the allegedly "artificially raised prices were not passed along a chain of distribution." *In re*

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[6] As required by Rule 14(g)(ii), petitioners identify 28 U.S.C. § 1331, 28 U.S.C §1337 and 28 U.S.C. §1407 as the statutes that provided the basis for federal jurisdiction in the court of first instance.

*Copper Antitrust Litigation*, 98 F. Supp. 2d 1039, 1053 (W.D. Wis. 2000).

After denying the motions to dismiss, the district court recognized that there was a serious question as to respondents' antitrust standing. Accordingly, it limited discovery to that question. The parties proceeded to take extensive discovery of respondents and their suppliers. That discovery resulted in a substantial undisputed record regarding the source of the copper products that respondents purchased and how the prices paid were determined. Global and the other defendants thus moved for summary judgment on the ground that respondents did not have standing.

In a 51-page decision that reviewed the extensive record, the district court granted summary judgment dismissing Viacom's and Emerson's action, holding that they did not have standing under *AGC*.

> Now that the record has been fleshed out with discovery, it is clear that the relationship between manipulations of the futures market and particular transactions in the physical copper market is neither direct nor predictable but subtle and complex.

App., *infra*, 82a. The district court stated:

> In opposition to the extensive evidence that defendants produced to show complexities of the alleged link between the two markets, plaintiffs have produce[d] no evidence to the contrary, except the CFTC finding. Instead, they simply reiterate their arguments that their claims are based solely on the 'surcharge' they

> had to pay on the exchange-based portion of the price for copper cathode as a result of defendants' manipulation. . . . At this stage of the proceedings, after seven months of discovery devoted to standing, more is required of plaintiffs than mere assertions about the ease in which a court could determine the link between defendants' actions and plaintiffs' alleged antitrust injuries.

*Id.* at 83a.

In a separate decision addressing the motion against Ocean View, the district court confronted the same theory of causation, and held that *Illinois Brick* and *AGC* barred Ocean View from recovering for alleged overcharges because it had not bought that copper from Global or the other defendants. *Id.* at 102a. Finding "no support in the case law for plaintiff's theory of the first purchaser as the equivalent of the direct purchaser under *Illinois Brick*," the district court rejected the "first purchaser" test offered by Ocean View as a substitute for the indirect purchaser rule. *Id.* at 128a-132a. The district court held that all of the physical copper that Ocean View purchased from semi-fabricators and traders had previously changed hands at least once. *Id.* at 132a-133a. The district court also held that, to the extent that Ocean View purchased physical copper from integrated producers, "it could not be sure that the producers were selling their own product or purchased product." *Id.* at 132a. The district court noted that Ocean View had proffered "no documentation to prove the source of any copper cathode it purchased or any evidence from which it might estimate what percentage of the cathode it purchased had been purchased previously." *Id.* at 132a-133a. The district court concluded

that "the question [of standing] is not a close one." *Id.* at 125a.

## B. The Court of Appeals' Decision

Respondents' appeals were consolidated by the Court of Appeals for purposes of rendering its decision. By a majority decision, the Court of Appeals reversed the grant of summary judgment as against each respondent. Judge Cudahy issued a concurring opinion.

The Court of Appeals held that *Illinois Brick* and *UtiliCorp* did not bar respondents' claims. *See* App., *infra*, 15a-23a. Although the Court of Appeals accepted that Global and the other defendants were not in the same chain of distribution as respondents, it concluded that respondents were exempted from the indirect purchaser rule set forth in *Illinois Brick*, limiting that holding to its facts and adopting an interpretation that triggers that rule if, and only if, a defendant sells the goods in question to the plaintiff's supplier.

> **The reason the plaintiffs' suit in *Illinois Brick* failed was not because the defendants did *not* sell to them. Rather, it was because the defendants *did* sell to a third party who (after *Hanover Shoe*) could recover for any injury they claimed.** The same paradigm applies in all of the cases cited by the defendants: Part A, the antitrust violator, sells to Party B, and then Party C, a down-stream purchaser from B, seeks to recover the implicit overcharges that B passed on to C.

> Here, in contrast, the plaintiffs are not indirect purchasers along a supply chain. As far as the plaintiffs' claims are concerned, Global, CLR, and Sumitomo did not sell cathode to integrated producers who in turn sold to any of the plaintiffs.

App., *infra*, 19a (emphasis added in bold; original emphasis in italics; citations omitted).[7]

The Court of Appeals invoked one of its prior decisions, *Sanner*, which did not address the indirect purchaser bar. App., *infra*, 20a-21a. It concluded that:

> the evidence viewed favorably to the plaintiffs shows that damage from the defendants' conduct was felt in two separate markets: the futures market and the physical copper market. We have identified those who may recover in the futures market and must now turn to the more difficult question of *establishing the proper plaintiff in the physical market*. The defendants' answer (nobody) is not supported by *Illinois Brick* -- or economics or fairness for that matter. Instead, we must be guided in our inquiry by the analytical framework and factors set out in *AGC*.

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[7] The last sentence in the above excerpt has no basis, as there was unrebutted evidence in the record to the contrary. Moreover, the Court of Appeals' decision inconsistently stated that Global and the other co-conspirators reaped their profits from the alleged conspiracy by reselling copper that they had purchased. *See* App., *infra*, 9a.

App., *infra*, 22a-23a (emphasis added).[8]

Turning to *AGC*, the Court of Appeals held that, as a result of simply referencing Comex prices in their contracts for physical copper, there was a "direct relation between the defendants' illegal scheme and [respondents'] harm." App., *infra*, 33a. It also held that, "[b]ecause copper is fungible, one cannot tell whether any given [ ] purchase of cathode consisted of cathode refined by Asarco or previously purchased product." App., *infra*, 36a. Nevertheless, the Court of Appeals dismissed the risk of duplicative recovery and the apportionment complications caused by the fact that integrated producers purchased millions of tons of copper cathode and other physical copper products from third parties, which they later resold and/or refined into copper cathode. *See id.* at 36a-37a.

In his concurrence, Judge Cudahy criticized the majority for, among other reasons, denuding the antitrust standing requirement of *AGC*. *Id.* at 53a-55a. Specifically, Judge Cudahy took issue with the dismissive way in which the majority confronted crucial facts that justified the district court's rejection of respondents' market-index theory of causation, including the existence of negotiable premiums (or discounts) that affected the prices paid by respondents for physical copper. *Id.* at 54a. Judge Cudahy also observed that the majority had opened the door for litigants to avoid *AGC*'s bar to overly complex and tenuous theories of causation by

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[8] As revealed by this quote, the Court of Appeals reached to find a plaintiff, adopting the view expressed by the dissent in *Illinois Brick* that there must always be a plaintiff. *Illinois Brick*, 431 U.S. at 760. As a point of fact, Global did not suggest that "nobody" in the physical copper market could recover, but maintained that any party that purchased from any of the alleged co-conspirators would have standing.

employing simple slogans that bear no relationship to reality.[9] *Id.* Despite this criticism, Judge Cudahy concurred in the result reached by the majority on the basis that the alleged misconduct justified the outcome. *Id.* at 55a.

## REASONS FOR GRANTING THE WRIT

### A. The Court of Appeals' Decision Is a Repudiation of the Indirect Purchaser Standing Rule

The Court of Appeals' decision is in direct conflict with *Illinois Brick* and *UtiliCorp*, and grants standing to plaintiffs not in privity with the alleged antitrust violators to pursue speculative price-fixing claims that ensure duplicative recovery. The Court of Appeals' decision subverted the objectives underlying the *Illinois Brick* standing rule, and will cause litigants and the courts to expend substantial resources to trace and apportion damages among those who may have been injured by a price-fixing conspiracy. The Court of Appeals acknowledged that this framework would be time consuming (App., *infra*, 42a-43a), yet reasoned that such a costly tracing exercise was justified because of petitioners' alleged misconduct. App., *infra*, 43a.

In *Illinois Brick*, this Court recognized that a proper plaintiff with standing under § 4 of the Clayton Act, *i.e.*, a direct purchaser, will not always emerge. *Illinois Brick*, 431 U.S. at 746. This Court determined that the policy underlying its decision had to be consistently applied, regardless of the consequences. *Id.* at 745-46. Echoing the dissent in *Illinois Brick, id.* at 760, however, the Court of

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[9] Judge Cudahy's criticism also noted that the majority's opinion ran afoul of *UtiliCorp*'s express prohibition of exceptions to *Illinois Brick*. *See* App., *infra*, 54a.

Appeals refused to accept such a result. Instead, it determined that, in its view, it was unfair that there might not be a plaintiff who can seek relief. App., *infra*, 43a. In other words, the Court of Appeals effectively repudiated this Court's strict antitrust standing rules. This bias against this Court's antitrust standing rules permeates the Court of Appeals' entire decision.

The Court of Appeals held that the indirect purchaser bar did not prohibit respondents from pursuing their price-fixing claims, despite the undisputed fact that respondents did not purchase physical copper from Global or any of the alleged co-conspirators. The Court of Appeals created a market-index exception in derogation of this Court's holding in *UtiliCorp* that "allowing an exception, even in rather meritorious circumstances, would undermine the rule." *UtiliCorp*, 497 U.S. at 216. And by creating this exception, because *Hanover Shoe* prohibits petitioners from relying on a pass-on defense, the Court of Appeals has exposed petitioners to ruinous liability.

The indirect purchaser bar was articulated by this Court more than 25 years ago. In *Illinois Brick*, the plaintiffs, including the State of Illinois, asserted price-fixing claims against manufacturers that purportedly fixed the price of concrete block. The plaintiffs did not purchase concrete block from the defendants, but asserted that they hired general contractors, and that the sub-contractors hired in connection with these projects "passed on the alleged overcharge on the block to general contractors, who incorporated the masonry structures into entire buildings, and . . . the general contractors in turn passed on the overcharge to [the plaintiffs] in the bids submitted for those buildings." 431 U.S. at 735. Even though the plaintiffs might have suffered actual injury,

this Court held that overriding considerations precluded them from seeking relief. *Id.* at 747-48.

This Court's analysis in *Illinois Brick* began with *Hanover Shoe*, in which this Court had held that a defendant could not offset damages because the unlawful overcharge was passed on to the plaintiff's customers. *Id.* at 724. This Court observed that the "first reason" for this rule was "an unwillingness to complicate treble-damages actions with attempts to trace the effects of the overcharge on the purchaser's prices, sales, costs, and profits, and of showing that these variables would have behaved differently without the overcharge." *Id.* at 725. Thus, permitting indirect purchasers to sue, while prohibiting a pass-on defense, "would create a serious risk of multiple liability for defendants." *Id.* at 730. This Court declined to "cut back or abandon the *Hanover Shoe* rule," *id.* at 736, because it:

> would transform treble-damages actions into massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge from direct purchasers to middlemen to ultimate consumers. However appealing this attempt to allocate the overcharge might seem in theory, it would add whole new dimensions of complexity to treble-damages suits and seriously undermine their effectiveness.

*Id.* at 737; *accord UtiliCorp*, 497 U.S. at 208.

Thirteen years later, this Court revisited the indirect purchaser bar. In *UtiliCorp*, the plaintiffs (States purportedly acting on behalf of their citizens) argued that the indirect purchaser rule was unnecessary because public utilities are

allowed to pass on all of their costs to consumers and the "customers pay the entire overcharge, obviating litigation over its apportionment." *UtiliCorp*, 497 U.S. at 208. This Court rejected the exception that was endorsed by the Seventh Circuit, and affirmed the bright line nature of the rule.

> The rationales underlying *Hanover Shoe* and *Illinois Brick* will not apply with equal force in all cases. We nonetheless believe that ample justification exists for our stated decision not to "carve out exceptions to the [direct purchaser] rule for particular types of markets." *Illinois Brick*, [431 U.S. at 744]. The possibility of allowing an exception, even in rather meritorious circumstances, would undermine the rule. . . . [E]ven assuming that any economic assumptions underlying the *Illinois Brick* rule might be disproved in a specific case, we think it an unwarranted and counterproductive exercise to litigate a series of exceptions.

*UtiliCorp*, 497 U.S. at 216.

Here, the Court of Appeals ignored that holding, attempted to limit the rule to the particular facts in *Illinois Brick*, and adopted the rejected standing concept set forth in the dissent in *UtiliCorp*. Quoting *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982) ("*McCready*"), the *UtiliCorp* dissent argued that:

> *Illinois Brick* "focused on the risk of duplicative recovery engendered by allowing every person along a chain of distribution to claim damages arising from a single transaction

> that violated the antitrust laws." . . . The danger of multiple recoveries does not exist aside from the apportionment difficulty; rather it stems from it. If only defensive use of a pass-through defense were barred, or it were extremely difficult to ascertain percentage of an overcharge that the utility passed through, then the supplier of natural gas might potentially have to pay overlapping damages to successive purchasers at different levels in the distribution chain. But where there is no apportionment difficulty, there is no comparable risk.

*Id.* at 225 (White, J., dissenting). Mimicking the *UtiliCorp* dissent, the Court of Appeals concluded that "*Illinois Brick* was meant only to preclude duplicative recovery." App., *infra*, 18a. Similarly, the Court of Appeals relied on *McCready* to tout the compensation mechanism of Section 4 of the Clayton Act. *Compare* App., *infra*, 18a, 23a *with UtiliCorp*, 497 U.S. at 220 ("Congress sought to ensure that victims of anticompetitive conduct receive compensation." (White, J., dissenting)). This Court rejected that approach when it concluded that the degree of difficulty in apportioning damages is not a factor to be considered. Indeed, in his concurring opinion, Judge Cudahy criticized the Court of Appeals' analysis of the indirect purchaser rule, and invited review of the decision: "[I]f the language of [*UtiliCorp*] about the undesirability of exceptions to *Illinois Brick* were to be applied here, the outcome might be in doubt." App., *infra*, 54a.

To justify its departure from *Illinois Brick*, the Court of Appeals created a straw man, stating that Global's contention that *Illinois Brick*'s direct purchaser rule required

privity had "eliminate[d] in one fell swoop all competitor suits based on exclusionary practices."[10] *Id.* at 17a. The Court of Appeals confronted this straw man by relying on *McCready* and several other decisions of this Court, none of which involved price-fixing or an alleged conspiracy to manipulate prices.[11] Rather, the decisions relied upon by the Court of Appeals, including *McCready*, involved exclusionary practices and group boycotts. *Id.* at 18a. The underlying actions here, by contrast, do not involve exclusionary practices. Thus, the Court of Appeals' assertion with respect to the effect of a privity requirement had no foundation.

Furthermore, the Court of Appeals' creation of a market-index exception conflicts with this Court's holding in *UtiliCorp*, as well as the underlying rationale of *Illinois Brick*. Specifically, the Court of Appeals held that, so long as respondents could demonstrate that some portion of their copper cathode purchases did not contain previously purchased copper, there was no risk of duplicative recoveries, and apportionment of damages would be a straight-forward exercise. *See* App., *infra*, 42a-43a. The Court of Appeals thus concluded that, once that risk was removed, it would

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[10] The Court of Appeals' comment also reflects a misunderstanding of the nature of this rule. The indirect purchaser rule specifically looks at the physical relationship between the plaintiff and defendant. If the two are not in privity in a commercial transaction, *a fortiori*, the defendant is an indirect purchaser.

[11] In stating that *McCready* established an exception to *Illinois Brick*, the Court of Appeals read it in a manner that is contrary to its own decision in *In re Brand Name Prescription Drugs Antitrust Litigation*, 123 F.3d 599 (7th Cir. 1997), *cert denied sub nom*, 522 U.S. 1153 (1998). That decision explains precisely why boycott claims, like those at issue in *McCready*, are not governed by *Illinois Brick* -- the *Illinois Brick* rule "is a rule concerning overcharges." *Id.* at 606.

become a relatively simple process for experts to estimate respondents' actual damages.[12] *Id.* at 33.

However, the Court of Appeals overlooked one important point: This "solution" does not prevent the intractable apportionment problems that *UtiliCorp* attempted to vanquish permanently. Specifically, respondents will have to determine the magnitude of the alleged manipulation on futures prices at the time of a given purchase, as the magnitude of the alleged manipulation of copper futures prices would change from month-to-month, week-to-week, day-to-day and hour-to-hour, as would any resulting impact on physical copper prices. The Court of Appeals also did not eliminate the need to discern between what it called "third party" cathode, the purchase of which it held cannot be the basis for respondents' claims, and "virgin" copper, the purchase of which the Court of Appeals held, can be the basis for respondents' claims.

This Court's holding in *UtiliCorp* was premised on avoiding these very pitfalls. This Court refused to permit apportionment of damages over a time-line.

> To the extent that the [utility] could have sought and gained permission to raise its rates in the absence of an overcharge, at least some portion of the overcharge is being borne by it; whether by overcharge or by increased rates, consumers would have been paying more for

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[12] In downplaying the complexity of determining whether, and to what extent, respondents may have been injured, the Court of Appeals relied on a series of this Court's decisions that pre-date *Illinois Brick*. App., *infra*, 37a. Each of these decisions was relied on by the dissent in *Illinois Brick*, but rejected by this Court. *See Illinois Brick*, 431 U.S. at 741-43.

> natural gas than they had been paying in the past.
>
> * * *
>
> Even if, at some point, a utility can pass on 100 percent of its costs to its customers, various factors may delay the passing-on process. . . . During any period in which a utility's costs rise before it may adjust its rates, the utility will bear the costs in the form of lower earnings. . . . Even after the utility raises its rates, moreover, the pass-through process may take time to complete. During this time, the utility and its customers each would pay for some of the increased costs.

497 U.S. at 210-11 (citations omitted). This Court concluded that any risk of duplicative recovery and the problem of apportioning damages would never justify an exception to *Illinois Brick*. *Id.* at 216.

Under the Court of Appeals' framework, respondents would have an incentive to establish that their purchases of "third party" cathode occurred when the manipulation was weakest. By contrast, Global would have an incentive to establish that respondents' purchases of "third party" cathode occurred when the effect of the manipulation of cathode prices was at its greatest. However, neither respondents nor Global would be able to make such a showing with any certainty because, as the Court of Appeals' decision recognized, copper is fungible and there is no way to ascertain when respondents purchased "third party" cathode. App., *infra*, 36a-37a. Given these inevitabilities, it is apparent that the Court of Appeals' decision will lead the parties and the district court down a road that this Court has specifically forbidden.

## B. The Court of Appeals' Decision Is in Direct Conflict with this Court's Antitrust Standing Rule

Respondents also had the burden of establishing that they had standing under this Court's decision in *AGC*, which placed limitations on the theories of causation upon which antitrust plaintiffs can rely. The Court of Appeals, however, relieved respondents of this burden by reducing the *AGC* test to whether there was any linkage, regardless of how tenuous, between the price paid by respondents and a market index.

Under *AGC*, an antitrust plaintiff must demonstrate a "'fairly . . . trace[able]' connection between the alleged injury in fact and the alleged conduct of the defendant." *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000); *accord Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102 (1998). Thus, as this Court explained in *AGC*, proof that defendants' conduct caused injury-in-fact to plaintiffs "does not end the inquiry." *AGC*, 459 U.S. at 537. Rather, there are several factors that must be considered to determine whether an alleged antitrust injury is sufficiently direct to permit antitrust standing.

Here, respondents lacked standing because their theory of causation was too tenuous and their injuries in the domestic physical copper market were too remote from defendants' conduct on the LME. Respondents also did not have antitrust standing because of the tremendous potential for duplicative recovery and the necessity of engaging in a complex process of apportioning damages. Relying on *Sanner*, however, the Court of Appeals rejected these arguments.

The Court of Appeals collapsed the *AGC* analysis into whether respondents made reference to a market index, and held that the reference to an index satisfied the test that the

injury be "sufficiently direct." This analysis ignored the rigorous requirements of *AGC*, which demand a more searching examination, as the district court had performed. *See AGC*, 459 U.S. at 535-36. In effect, the decision strikes the word "sufficiently" from this Court's holding in *AGC*. The Court of Appeals refused to follow the chain of causation to determine how a change in futures prices affected the price ultimately paid by respondents, and ignored the evidence of all the other factors that affected that price. Had it followed the dictates of *AGC*, the Court of Appeals would have been compelled to hold that the impact on the prices paid by respondents was not "sufficiently direct."[13] *See, e.g., Reading Industries, Inc. v. Kennecott Copper Corp.*, 631 F.2d 10, 13-14 (2d Cir. 1980), *cert denied*, 452 U.S. 916 (1981); *de Atucha v. Commodity Exchange, Inc.*, 608 F. Supp. 510, 514-18 (S.D.N.Y. 1985).

Further, the Court of Appeals reached this erroneous outcome by relying on the Court of Appeals' decision in *Sanner*. *Sanner*, however, was a decision denying a motion to dismiss a complaint that contained broad, conclusory allegations, and hence there was no searching of the record. Thus, the Court of Appeals could no more rely on that decision than the district court could rely on its decisions denying the motions to dismiss respondents' complaints. As

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[13] It was undisputed that respondents' contracts contained a variety of pricing options, as well as the right to renegotiate both premiums and basis prices. It also was undisputed that a manipulation of futures prices does not cause a uniform, predictable effect on physical prices. Yet, the Court of Appeals held that, because the premiums respondents paid moved directionally with futures prices, the "directness element of *AGC*" was satisfied. App., *infra*, 33a. As Judge Cudahy and the district court observed, however, this conclusion avoids the relevant issue: whether through adjustments of premiums or other means parties adjust for an allegedly artificial price inflation on the futures market. *Id.* at 54a, 82a.

Judge Cudahy (*Sanner*'s author) explained in his concurrence, given the factual record submitted by the parties (as opposed to the bare allegations in *Sanner*), the Comex and the market for physical copper did not move in lockstep. *See* App., *infra*, 53a-54a. Indeed, Judge Cudahy sharply criticized the majority for improperly reducing *AGC*'s requirement of directness to a "slogan."[14] *Id.* at 54a.

The Court of Appeals treated *AGC*'s requirement that it examine the risk of duplicative recoveries dismissively. It held that, so long as respondents could demonstrate that some portion of their copper cathode purchases did not contain previously purchased copper, there was no risk of duplicative recoveries. *See* App., *infra*, 36a-37a. The Court of Appeals was of the view that, once that risk was removed, it would become a relatively simple process for experts to estimate respondents' actual damages. *Id.* at 37a.

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[14] In his concurrence, Judge Cudahy harshly criticized the Seventh Circuit majority's *AGC* analysis and rejected the majority's finding that the manipulation of a futures market necessarily produces a precisely proportionate consequence in the cash market.

> This is hardly the case with the Comex and the market for physical copper. Even though the majority attempts to minimize the departures from a fully direct relationship between the futures and the physicals market (and takes issue with the more critical analysis of these relationships by the district court), under either view "lock-step" becomes more a slogan than a fact. . . . The existence, in the case before us, of a negotiable premium (or discount) as part of the price is enough in itself to remove this relationship from the "lock-step" category.

App., *infra*, 54a-55a.

However, as noted above, the Court of Appeals overlooked one important point: Its "solution" does not prevent the intractable apportionment problems that *AGC* forbids. Specifically, the damage-apportionment framework established by the Court of Appeals does not eliminate the need to know whether a particular lot of copper cathode purchased by respondents was (or contained) what the Court of Appeals called "third-party" cathode as the magnitude of petitioners' alleged manipulation of futures prices would change from month-to-month, week-to-week, day-to-day and hour-to-hour. *See* this Petition at 18-20, *supra*.

Further, the Court of Appeals' acceptance of a mere reference to a market index inherently creates the meaningful risk of infinite duplicative damages. The Court of Appeals acknowledged that numerous other parties earlier in the chain of distribution also refer to the market index. App., *infra*, at 6a, 34a-35a. Global and Sumitomo sold only a finite amount of copper to a known number of people. Yet, a vast number of parties, none of whom ever had any dealings with Global and Sumitomo, would be entitled to seek damages under the Court of Appeals' holding. Thus, as an example, all of the parties that purchased the various copper components that were used to produce the copper products sold to respondents would also have the ability to seek damages. This risk of crushing duplication is not hypothetical, as those parties already obtained recoveries from the settlement fund created in an action in California State Superior Court against Global and Sumitomo. *See* App., *infra*, 40a.

### C. The Court of Appeals' Decision Conflicts with Numerous Decisions from Other Circuits

Since *Illinois Brick*, the circuits have consistently prohibited antitrust plaintiffs, like respondents, from pursuing

price-fixing claims against defendants when, as here, the plaintiffs are not in privity with the defendants or their alleged co-conspirators. The Court of Appeals' decision, however, is in direct conflict with these holdings.

> *Illinois Brick* does not stand for the proposition, as the defendants would seem to have it, that a defendant cannot be sued under the antitrust laws by any plaintiff to whom it did not sell (or from whom it does not purchase).

App., *infra*, 17a.

By adopting its erroneous interpretation of *Illinois Brick*, the Court of Appeals has placed itself in direct conflict with the other circuits, which universally recognize that *Illinois Brick* created a bright-line rule that prohibits antitrust plaintiffs from pursuing price-fixing claims unless such plaintiffs are in privity with the defendants or, at the very least, one of the co-conspirators. *See, e.g.*, *McCarthy v. Recordex Service, Inc.*, 80 F.3d 842, 847-48 (3d Cir. 1996), *cert. denied*, 519 U.S. 825 (1996) (*Illinois Brick* "enunciat[ed] a bright-line rule that only the purchaser immediately downstream from the alleged monopolist may bring an antitrust action"); *In re Beef Industry Antitrust Litigation*, 710 F.2d 216 (5th Cir. 1983) ("*Beef II*"); *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 691 F.2d 1335 (9th Cir. 1982), *cert denied sub nom. California v. Standard Oil Co.*, 464 U.S. 1068 (1984); *Mid-West Paper Prods. Co. v. Cont'l Group, Inc.*, 596 F.2d 573, 583, 587 (3d Cir. 1979) (rejecting price-fixing claims arising out of purchases from defendants' competitors at allegedly artificial prices).

For example, in *McCarthy*, attorneys' clients brought suit against hospitals and copy services responsible for photocopying their hospital records. The attorneys, not the clients, purchased the photocopies. *Id.* at 845-46. The plaintiffs argued for an exception to *Illinois Brick*, maintaining that the attorneys acted as their agents. *Id.* at 852. The Third Circuit held that the plaintiffs could not "escape the absolute bar of the 'direct purchaser' rule" because the "attorneys, and not the clients, were undeniably the direct purchasers of the photocopies . . ." *Id.* The Third Circuit reasoned:

> Plaintiffs are no more direct purchasers of the hospital record photocopies at issue here than a passenger in a taxicab would be considered a direct purchaser of the gasoline used by the taxicab to carry the passenger to his destination. *Moreover, even if a separate charge for gasoline were assessed, the taxi passenger still could not be considered a direct purchaser in any sense.*

*Id.* at 853 n.18 (emphasis added).

The Court of Appeals' decision here directly conflicts with this decision of the Third Circuit in two respects. First, the Third Circuit headed this Court's admonitions in *UtiliCorp* and refused to recognize an agency exception to *Illinois Brick*. Second, the Third Circuit refused to excuse the plaintiffs from *Illinois Brick*'s privity requirement on the ground that the alleged overcharge paid by the plaintiffs could be separated from the overall cost of the service purchased by the plaintiffs from third parties. Here, the Court of Appeals wrongly brushed aside persuasive decisions like *McCarthy*, and distinguished them on the ground that they involved a chain

of distribution where Person A sells to Person B who, in turn sells to Person C. App., *infra*, 19a.

The conflict between the Court of Appeals' decision and another Third Circuit decision, *Mid-West Paper*, cannot be distinguished on this basis. *Mid-West Paper* did not involve the chain of distribution paradigm that the Court of Appeals found distinguishable. In *Mid-West Paper*, the defendants manufactured paper bags used to package such items as pet food, coffee, cookies and chemicals. *Id.* at 575. The plaintiffs, who were grocery stores, purchased empty bags from various middlemen and wholesalers. The plaintiffs also purchased various products that were prepackaged in such bags. The plaintiffs, save one, did not purchase from any of the defendants. In an effort to escape the strictures of *Illinois Brick*, the plaintiffs relied upon an umbrella theory of causation, whereby they alleged that the defendants, through a price umbrella, were able to causes prices in the entire market for paper bags to rise artificially. The Third Circuit rejected this end-run around *Illinois Brick*. *Id.* at 575.

The Third Circuit explained that the price umbrella relied upon by the plaintiffs created the exact same problems and complications that were involved in *Illinois Brick* because in "both situations the plaintiff seeks to recover for higher prices set by, and paid by it to, parties other than the defendants." *Id.* at 584. Noting that numerous factors influence a firm's pricing decisions, the Third Circuit held that such an umbrella theory of causation rendered the plaintiffs' claims conjectural and speculative. *Id.* at 584-85. The Third Circuit also observed that ascertaining how and why the defendants' competitors (who sold to the plaintiffs) charged a certain price would bog the district court down in the very complex analysis that this Court prohibited. The risk of such complications, combined with the ruinous recoveries

weil in excess of the defendants' illegally earned profits, led the Third Circuit to hold that the plaintiffs' claims were barred by *Illinois Brick*. *Id.* at 586.

The Court of Appeals' decision also directly conflicts with rulings by the Fifth Circuit. Indeed, respondents' claims are remarkably similar to claims arising out of an alleged conspiracy to depress the price of beef paid to cattlemen and ranchers. *See generally Beef II,* 710 F.2d at 220; *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148, 1159-60 (5th Cir. 1979) ("*Beef I*").

The plaintiffs -- cattlemen, ranchers and feeders -- asserted private antitrust claims against several retail food chains and a wholesale grocer, as well as the retail chains' national trade association and a beef industry price-reporting publication. Exactly like respondents here, the *Beef* plaintiffs alleged that the prices paid for beef by retail chains to wholesalers were "derived directly" from a so-called "Yellow Sheet" published by the industry's trade association. *Beef I*, 600 F.2d at 1154. The plaintiffs alleged that, by acting in concert and publishing the Yellow Sheets, the defendants were able to fix the price of beef at artificially low levels, thereby damaging the plaintiffs. *Id.* at 1154-55. The defendants successfully moved to dismiss on the ground that, *inter alia*, the plaintiffs' claims were barred by *Illinois Brick*.[15] *Id.* at 1154. On appeal, the Fifth Circuit reversed, holding that the plaintiffs' claims fit within the narrow "cost-plus exception" articulated in *Illinois Brick*. *Id.* at 1163-67.

On remand, after permitting the parties to take discovery, the district court granted the defendants' motions for summary

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[15] The district court's decision on the defendants' motion to dismiss and the Fifth Circuit's subsequent decision both pre-dated this Court's decision in *AGC*. Nonetheless, the decision in *Beef II* resonates with the concerns expressed by this Court in *AGC*.

judgment. *Beef II*, 710 F.2d at 219. The Fifth Circuit held that the plaintiffs' summary judgment proof fell "far short of their allegations," and affirmed the district court's decision. It held that "[t]he defendants' overwhelming proof demonstrates that other factors beyond the Yellow Sheet quotations influenced the packers' pricing decision." *Id.* Such factors included: (i) the packers' individual needs; (ii) temporary local market conditions; (iii) price competition among the packers; and (iv) the beef by-product market. *Id.* at 219-220.

In words equally applicable to respondents' claims here, the Fifth Circuit rejected the plaintiffs' market-index theory.

> The nature of a cost-plus contract is such that there is absolute certainty as to the application and the amount of the pass-on. Individual transactions do not have to be weighed to measure whether and to what extent the pass-on occurred. Plaintiffs' averaging theory does not partake of this certainty. As the district court noted, "[i]f packers averaged out gains and losses, . . . they would absorb some loss on some days." [citation omitted]. *To show how much of the loss was absorbed by the packers would be to resort to the sort of speculative evidence forbidden by Illinois Brick.*

*Id.* (emphasis added). The Court of Appeals' decision is diametrically at odds with this ruling.

In sum, the Court of Appeals' decision goes far beyond the theories rejected by the Third Circuit and the Fifth Circuit. By conflicting with the decisions issued in those circuits, the Court of Appeals has opened the door to numerous claims by indirect purchasers. As the Third Circuit explained in *Mid-West Paper*,

permitting such plaintiffs to proceed with their claims (i) undermines the antitrust laws' goal of deterrence by forcing the courts and parties to expend valuable resources to conduct a complex economic analysis fraught with dangers; and (ii) exposes petitioners to ruinous liability far in excess of what was contemplated by the antitrust laws. If this Court does not resolve this conflict, and the Court of Appeals' decision is allowed to stand, it will signal to the other circuits that this Court did not mean what it said in *UtiliCorp* and that, in fact, there are exceptions to *Illinois Brick*.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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## APPENDIX A

**United States Court of Appeals**
**Seventh Circuit**

**No. 00-3979, 01-1148, 01-3229, 01-3230, 01-3485**

**[Filed September 20, 2002]**

| | |
|---|---|
| LOEB INDUSTRIES, INCORPORATED, Los Angeles Scrap Iron & Metal Corporation, and Metal Prep Company, Incorporated, Plaintiffs-Appellants, | ) |
| v. | ) |
| SUMITOMO CORPORATION and Global Minerals and Metals Corporation, Defendants-Appellees. | ) |
| Loeb Industries, Incorporated, Los Angeles Scrap Iron & Metal Corporation, and Metal Prep Company, Incorporated, Plaintiffs-Appellants, | ) |
| v. | ) |
| JPMorgan Chase & Co.,* | ) |

* For purposes of this opinion we are using the current name of the bank, which is JPMorgan Chase & Co. That entity includes both

Defendants-Appellees. )
)
Ocean View Capital, Incorporated, formerly )
known as Triangle Wire & Cable, Incorporated, )
Plaintiff-Appellant, )
)
v. )
)
Sumitomo Corporation of America, Sumitomo )
Corporation, Global Minerals and Metals )
Corporation, et al., )
Defendants-Appellees. )
)
Argued Sept. 5, 2001 )
Submitted Sept. 13, 2001** )
)
Viacom, Incorporated, as successor by merger )
to CBS Corporation, formerly known as )
Westinghouse Electric Corporation, and )
Emerson Electric Company, )
Plaintiffs-Appellants, )
)
v. )
)
Global Minerals and Metals Corporation and )

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J.P. Morgan & Co., Inc., and Morgan Guaranty Trust Co. of New York.

** After an examination of the briefs and the record in Nos. 01-3229 and 01-3230, we have concluded that oral argument is unnecessary. Thus, those appeals are submitted on the briefs and the record. See Fed. R. App. P. 34(a)(2).

Credit Lyonnais Rouse, Ltd., )
Defendants-Appellees. )
_____ )

Appeals from the United States District Court
for the Western District of Wisconsin
Nos. 99-C-377, 99-C-468, 99-C-621, 99-C-801, 00-C-274, 00-C-528
Barbara C. Crabb, Chief Judge

Argued May 16, 2002
Decided Sept. 20, 2002

Before CUDAHY, ROVNER, and DIANE P. WOOD, Circuit Judges.

DIANE P. WOOD, Circuit Judge.

These cases, which we have consolidated for purposes of this opinion, all arise out of an alleged conspiracy in the 1990s to fix the price of copper futures at artificially high levels on the international exchange markets. This market manipulation necessarily and directly inflated the price of the products purchased by the plaintiffs, buyers of copper cathode, copper rod, and scrap copper, who have sued for violations of the Sherman Act, RICO, and various state laws. The district court dismissed the claims of each of the plaintiffs either on the ground that their claims were barred by the indirect purchaser rule of *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977), or on the ground that their injuries were too remote and speculative under *Associated General Contractors of Cal. Inc. v. California State Council of Carpenters*, 459 U.S. 519, 103

S.Ct. 897, 74 L.Ed.2d 723 (1983) (*AGC* ). We find that Illinois Brick presents no obstacle to any of the plaintiffs' claims but that the claims of the scrap copper dealers are precluded under AGC. On the other hand, we conclude that the purchasers of copper cathode and rod have suffered a direct and independent injury and are the best situated participants in the physical copper market to bring a lawsuit. We therefore affirm in part, reverse in part, and remand in part for further proceedings.

## I

### A. The Parties

The production of copper entails a complicated four-step process. First, copper producers extract ore from a copper mine and crush or mill it into a gravel-like substance known as concentrate. Second, smelters separate out the nonferrous metals in the concentrate, producing one-meter square plates of anode, which are approximately 90% copper. Next, the anode is refined electrolytically to create sheets of cathode. Finally, the cathode is fed into a furnace at a mill and melted into rod or wire. In the course of manufacturing cathode and rod, scrap copper is also produced, and it too can be sold into the market.

The plaintiffs in these actions are large companies occupying various positions along the copper production chain. The plaintiffs in No. 01-3485, Viacom, Incorporated (a successor to Westinghouse Electric Corporation) and Emerson Electric Company, turn copper cathode into wire for resale to merchants. Each purchased hundreds of millions of pounds of cathode during the relevant time period from

integrated producers, who smelt and refine copper from their own mines into cathode.

Ocean View Capital is the plaintiff in Nos. 01-3229 and 01-3230. Until it went out of business in 1996, it was a large Rhode Island-based manufacturer of copper wire and cable. Unlike Viacom and Emerson, Ocean View normally did not purchase cathode; instead, it bought copper that had already been transformed into rod. Some of this rod was manufactured by integrated producers.

Ocean View also contracted frequently with semi-fabricators, which own and operate rod mills but do not own mines, concentrators, smelters, or refineries. Instead, semi-fabricators typically purchase cathode from producers or copper traders and fabricate the cathode into rod. On some occasions, Ocean View varied this process by entering into tolling agreements with its semi-fabricators under which it purchased its own cathode from producers or traders and then paid the semi-fabricator to convert it into usable rod.

The plaintiffs in *Loeb Industries v. Sumitomo*, Nos. 00-3979 and 01-1148, are three scrap metal dealers (to whom we refer as the "Scrap Dealers"). Each purchases only scrap copper; none buys either cathode or rod. The scrap is purchased from a variety of sources, including integrated producers and wire manufacturers, and then repackaged and resold.

### B. The Copper Market

Despite the fact that copper is sold in a variety of physical forms, the summary judgment record (viewed in the

light most favorable to the plaintiffs) indicates that the pricing of copper is consistent throughout the industry. Like many other commodities, copper is traded on commodities exchanges through warrants and futures contracts. Most copper futures are traded on either the London Metals Exchange (LME) or the Commodities Exchange Division of the New York Mercantile Exchange (known familiarly as the "Comex"). When futures contracts mature, they must either be closed out by an offsetting trade or satisfied by deliveries of the underlying physical goods. If a futures trader is short, she must satisfy her obligation under the futures contract by immediately delivering physical copper cathode to an LME or Comex warehouse; if a trader is long, she may similarly call in physical copper cathode from a warehouse. Because of this, the price of physical copper, including cathode, rod, and scrap copper, is directly linked to the LME and Comex price for copper futures, and dealers in all forms of physical copper quote prices based on rigid formulas related to copper cathode futures.

While sales between six plaintiffs and numerous other copper industry participants are involved, we will illustrate this linkage by discussing only the relationship between one of the plaintiffs, Viacom, and the largest integrated producer, Asarco. Viacom entered into yearly supply contracts with Asarco, copies of which are included in the record. In these contracts, the price Viacom paid Asarco for cathode was made up of two components. First, the base price was set by "the arithmetic average of the COMEX first position settlements for high-grade copper during the calendar month of scheduled shipment." From 1990 to 1996, this price fluctuated from about 75cents/lb to over $1.40/lb. Added to the base price was a "cathode premium" that was set on a

monthly or quarterly basis. Asarco's premium fluctuated over the relevant time period from 2.75cents/lb to 3.5cents/lb. The record also indicates that when the base price of copper increased, the premium tended to increase as well.

Viacom bought over half a billion pounds of cathode from Asarco. Asarco manufactured most of this cathode, but some had been purchased for resale from other merchants to make up for production shortfalls. Because records of these purchases were not kept, it is impossible to tell whether any particular pound of cathode sold to Viacom was manufactured by Asarco or merely purchased for resale. The defendants concede, however, that some of the cathode in question was being sold into the market for the first time.

While there is some dispute as to the exact numbers, taking the evidence in the light most favorable to Viacom, Asarco sold it 510 million pounds of cathode over the relevant period. During this same time frame, Asarco refined 6.4 billion pounds of cathode and purchased 153 million pounds from third parties. Therefore, even if one assumed that every scrap of Asarco's previously sold cathode was shipped to Viacom (instead of to one of its many other customers), Viacom still purchased 357 million pounds of never-before-purchased cathode. Viacom seeks damages in this suit only for cathode that was sold to it for the first time by its integrated producers.

Asarco also purchased raw materials, such as concentrate and anode, to supplement its own production and keep its smelters and refineries running at full capacity. At least 27 million pounds of the cathode Asarco shipped to Viacom consisted entirely of Asarco raw materials, but the

rest may well contain some percentage of previously purchased materials. While raw materials are often priced in reference to Comex prices, only cathode is actually traded on the exchange. Raw material prices also incorporate significant and widely varying discounts based on both the cost of converting the materials into cathode and current refining and smelting capacity. Furthermore, the defendants' experts testified that while the prices of raw materials "may be indirectly affected by the manipulations," a squeeze or corner on cathode could not directly harm the purchasers of pre-cathode raw materials.

The pricing of rod and scrap are similar except that each contains further premiums and discounts off the cathode futures price to reflect a variety of additional costs. Rod pricing contains an additional rod or shaping premium. Scrap copper prices are affected by not only the price of cathode but also freight costs, sizing, sorting, packaging, and purity requirements.

Some of Viacom's suppliers and customers engaged in strategic hedging by purchasing "put" options on the futures markets. A put option holder has the right, but not the obligation, to sell a futures contract at an established "strike" price. If the market price is higher than the strike price (because, for example, the price has been artificially raised), the holder's option will expire and its only cost will be the price of the option. Asarco purchased put options to hedge its output, but it did not hedge against specific transactions, by, for example, purchasing a futures contract for each sale made to Viacom. Its hedging activities were also limited to a fraction of its supply. One of Viacom's suppliers, Kennecott,

did not hedge at all, and Viacom itself never hedged its copper purchases.

### C. The Conspiracy

Defendant Sumitomo Corporation is a Japanese trading corporation that attempted to fix and maintain the price of copper at artificially high levels from September 1993 to June 1996, all with an eye to enriching itself in its capacity as a seller of physical copper. Through a series of transactions with defendant Global Minerals and Metals Corporation, a copper merchant, it hoarded vast supplies of physical copper for the purpose of restricting supply, and it entered into paper transactions in order to show a false increased demand for the metal. In particular, Sumitomo established sham long-term contracts that purportedly required it to purchase vast quantities of copper from Global on a monthly basis over a period of three years. These sham contracts enabled Sumitomo publicly to justify its accumulation of excessive copper forward positions as a hedge. By June 1995, Sumitomo held approximately ten percent of the entire long position in Comex copper futures.

At that time, Sumitomo began to call in shorts to raise copper demand to inflated levels and to reap the profits from its sales. When these contracts came due, short futures traders were forced to cover their positions by acquiring physical copper at inflated prices, because no new copper was entering the warehouses thanks to Sumitomo's actions. These manipulations caused the price of primary copper to rise more than 50% over a two-year period. In June 1996, the scheme was uncovered, and the trading price for copper dropped by

a third almost overnight. The prices of physical copper cathode, rod, and scrap crashed comparably.

In 1998, the United States Commodities and Futures Trading Commission (CFTC) determined that Sumitomo had violated the Commodity Exchange Act by raising and fixing the price of copper futures and reached a settlement with the company that required it to pay a $150 million fine. That finding has spawned a number of antitrust suits against the defendants, including class action lawsuits on behalf of those who traded copper futures and on behalf of certain purchasers of primary copper. Sumitomo settled its suit with the futures traders for approximately $134 million. The defendants have also settled a California state court class action brought under various state antitrust laws. Many of the plaintiffs' sellers, including Asarco, participated in the lawsuit and received 0.15 cents per dollar of copper purchased.

## II. Proceedings in the District Court

These lawsuits were all consolidated in the Western District of Wisconsin by the Judicial Panel on Multidistrict Litigation. The defendants include not only Sumitomo and Global, but also alleged co-conspirators Credit Lyonnais Rouse, Ltd. (CLR), and J.P. Morgan and Morgan Guaranty Trust (which have since merged to form JPMorgan Chase & Co. and to whom we refer collectively as JPMorgan Chase). The plaintiffs in each case sought damages for the allegedly inflated overcharge in the price of the copper products they had purchased, which was caused by Sumitomo's actions. The Scrap Dealers also sought certification of a class under Fed. R. Civ. P. 23 consisting of all metals dealers who

purchased any form of physical copper in commercial quantities between 1994 and 1996. The defendants moved to dismiss each of the actions.

The district court first denied the motion to dismiss Ocean View's complaint on May 9, 2000. *In re Copper Antitrust Litig.*, 98 F.Supp.2d 1039 (W.D.Wis.2000). The district court found that if the facts alleged in the complaint were true, Ocean View was a proper party to sue under the principles espoused by this court in *Sanner v. Board of Trade*, 62 F.3d 918 (7th Cir.1995). The court also denied a motion to dismiss Viacom's complaint on similar grounds. It allowed both cases to proceed, but limited discovery to the issue of standing.

The court next examined the claim of the Scrap Dealers. It denied their motion for class certification, fundamentally because it concluded that the proposed named plaintiffs could not sue, either for their own injuries or for those of others similarly situated, because they fell within the ban on indirect purchaser suits established by *Illinois Brick*, 431 U.S. at 720, 97 S.Ct. 2061. The court decided in addition that the proposed class would be unmanageable, because it would be impossible to ascertain class membership. It then turned to the defendants' 12(b)(6) motion to dismiss. The court found that the Scrap Dealers' bare-bones allegations were sufficient to state a claim, but that in light of deposition testimony and other facts adduced during litigation of the *class certification* question, it would nonetheless grant the motion based once again on the perceived *Illinois Brick* flaw. The court did not, in so ruling, follow the command of Rule 12(b)(6) to convert the motion to dismiss into a motion for summary judgment under Rule 56, despite its reliance on

matters outside the complaint. The court also dismissed the Scrap Dealers' RICO allegations on the same grounds.

Soon thereafter the district court granted JPMorgan Chase's motion to dismiss all claims that the Scrap Dealers had brought against it on the ground that the plaintiffs were subject to offensive issue preclusion on the pivotal question of their status as indirect purchasers.

After discovery closed in the remaining cases, the defendants filed for summary judgment. On July 23, 2001, the district court granted summary judgment to all of the defendants on Ocean View's claims, finding that Ocean View had no right to sue under the antitrust laws both because it was an indirect purchaser (*Illinois Brick*) and because its injuries were too remote (*AGC*). A month later, the district court granted summary judgment to Global and CLR on Viacom's claim. In contrast to its conclusions in *Loeb* and *Ocean View*, the court here rejected the argument that the claim was barred by *Illinois Brick*. Instead, it applied the factors set forth in *AGC* and determined that a manipulation of the futures market would have effects too "subtle and complex" to warrant recovery for these cathode purchasers. The district court primarily relied on the following factors: (1) the huge number of exchange-based pricing formulas available on Comex; (2) the various premiums and discounts available in the industry; (3) potential duplication of recovery due to purchases of cathode and raw materials by the integrated producers who sold to Viacom; (4) potential duplication of recovery due to hedging; and (5) the complexity of the damages calculation. For similar reasons, the district court also granted summary judgment to the defendants on Viacom's RICO claims. With the federal

claims gone, it finally dismissed Viacom's state law claims without prejudice.

## III. Use of Rule 12(b)(6)

Before turning to the important antitrust issues underlying all of these appeals, we must deal with an issue of federal civil procedure unique to the appeal of the Scrap Dealers. They argue that the district court committed reversible error by relying on outside materials in evaluating the motion to dismiss without giving them notice and an opportunity to submit additional materials. As they correctly point out, Rule 12(b) requires that if the district court wishes to consider material outside the pleadings in ruling on a motion to dismiss, it must treat the motion as one for summary judgment and provide each party notice and an opportunity to submit affidavits or other additional forms of proof. *Fleischfresser v. Directors of School Dist. 200*, 15 F.3d 680, 684 (7th Cir.1994). This requirement of a reasonable opportunity to respond is mandatory, not discretionary. *Edward Gray Corp. v. National Union Fire Ins. Co.*, 94 F.3d 363, 366 (7th Cir.1996).

In this case, the district court stated that, considering only the bare pleadings, it would find that the Scrap Dealers had stated a claim. Notwithstanding this conclusion, relying on the materials and affidavits produced for the earlier class certification hearing, it instead granted the defendants' motion dismissing the case. We agree with the Scrap Dealers that this was error, and that the district court should have given them notice of its intentions and an opportunity to respond and produce additional facts going beyond whatever might have been appropriate for class certification purposes.

The question, however, is what the consequence of this error should be. The Scrap Dealers assume that reversal should be automatic, but this position overlooks the command of 28 U.S.C. § 2111, which directs appellate courts to apply the harmless error rule to anything that does not affect the "substantial rights of the parties." We are not aware of any case that holds that the command of Rule 12(b)(6) to convert a motion to dismiss into a summary judgment motion is somehow exempt from § 2111. The question for us is therefore whether the district court's error affected the Scrap Dealers' substantial rights.

To answer that question, we must consider whether the Scrap Dealers have shown us any evidence raising a question of material fact that they would have submitted to the district court had they been given proper notice of the de facto conversion. *Burick v. Edward Rose & Sons*, 18 F.3d 514, 516 (7th Cir.1994). If there are no potential disputed material issues of fact, then the court's reliance on materials outside the pleadings is not by itself ground for reversal despite the failure to follow appropriate procedures. *Ribando v. United Airlines, Inc.*, 200 F.3d 507, 510 (7th Cir.1999). Here, the dispute over whether the Scrap Dealers were proper plaintiffs to sue under the antitrust laws was a hard-fought issue in the class certification hearings, and the Scrap Dealers devoted substantial portions of both their reply brief and supplemental brief to the issue. Furthermore, the district court provided an after-the-fact opportunity to the Scrap Dealers to bring additional materials to its attention in the subsequent litigation against JPMorgan Chase. *See Edward Gray Corp.*, 94 F.3d at 366 (reversing where plaintiff had no opportunity to submit materials that did create a factual dispute). In light of these facts, we are confident that the Scrap Dealers had a full

opportunity to bring all material factual disputes to the court's attention. Therefore, we will review dismissal of all of these actions, as we would any other ruling on summary judgment, drawing all disputed or potentially disputed factual inferences in favor of the plaintiffs and deciding *de novo* whether the defendants were entitled to judgment on the law. *Simmons v. Chicago Bd. of Educ.*, 289 F.3d 488, 491 (7th Cir.2002).

The Scrap Dealers also contend as a threshold matter that the district court's reliance on materials submitted for the class certification hearing to rule against them on summary judgment violates the dictates of *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974). This over-reads Eisen, in our opinion. *Eisen* merely indicates that a court may not refuse to certify a class on the ground that it thinks the class will eventually lose on the merits. *Id.* at 177-78, 94 S.Ct. 2140; *see also Szabo v. Bridgeport Mach., Inc.*, 249 F.3d 672, 677 (7th Cir.2001). It says nothing about whether courts may use evidence produced at a prior class certification hearing for other purposes, including for a decision on summary judgment. We see no reason why these affidavits should be treated any differently from other parts of the record which may be considered in later rulings. *See Kochlacs v. Local Bd. No. 92*, 476 F.2d 557, 558 n. 1 (7th Cir.1973). We may therefore rely on the materials and affidavits submitted at the class certification hearing in determining whether the district court's decision to grant the defendants' motion in the Scrap Dealers' action was correct.

## IV. Illinois Brick

While the Clayton Act permits civil suits by "any

person who shall be injured in his business or property," 15 U.S.C. § 4, courts have long acknowledged that not every person, however tangentially injured by an antitrust violator, may recover treble damages. *Blue Shield of Va. v. McCready*, 457 U.S. 465, 477, 102 S.Ct. 2540, 73 L.Ed.2d 149 (1982). Numerous doctrines have arisen to clarify the circumstances under which a particular person may recover from an antitrust violator. At times these doctrines are rather incautiously lumped together under the umbrella term of "antitrust standing." However, the Supreme Court has generally been careful to limit the actual question of standing to the simple inquiry of whether a plaintiff has suffered a redressable injury in fact, entitling the federal courts to hear such a "case or controversy" under Article III. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). There is no dispute that the plaintiffs in these cases have been injured by paying an inflated price for copper; their Article III standing is therefore secure. The difficult question is statutory, because the Sherman Act has additional rules for determining "whether the plaintiff is the proper party to bring a private antitrust action." *AGC*, 459 U.S. at 535 n. 31, 103 S.Ct. 897. For example, the injury must be an "antitrust injury" caused by anti- competitive behavior as opposed to mere economic loss. *Brunswick v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 487-89, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977). Two other limitations on which parties may bring suit for antitrust violations are central here: the proximate cause requirements of *AGC*, 459 U.S. at 544- 45, 103 S.Ct. 897, and the direct purchaser rule of *Illinois Brick*, 431 U.S. at 729-30, 97 S.Ct. 2061.

*Illinois Brick* holds that the direct purchaser from the alleged antitrust violator(s) is the one with the right of action; those further removed from the illegal arrangement may not (under the federal antitrust laws, at least) bring their own actions. 431 U.S. at 729, 97 S.Ct. 2061. In *Illinois Brick* itself, the defendants were companies who sold bricks to masonry contractors at allegedly inflated prices. The contractors in turn allegedly "passed on" those overcharges to the plaintiffs who purchased their constructed buildings. *Id.* at 726, 97 S.Ct. 2061. In an earlier decision, *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968), the Supreme Court had decided that defendants could not escape liability on the ground that the plaintiff had passed on the anticompetitive overcharge. By parity of reasoning, the Court decided in *Illinois Brick* that the persons authorized to sue under the antitrust laws in this type of case were the direct purchasers. Hence, the contractors were permitted to sue and recover in full for the price inflation, including any "pass-on."

*Illinois Brick* does not stand for the proposition, as the defendants would seem to have it, that a defendant cannot be sued under the antitrust laws by any plaintiff to whom it does not sell (or from whom it does not purchase). Such a rule would eliminate in one fell swoop all competitor suits based on exclusionary practices--a step that some antitrust theorists have urged, but a step that the Supreme Court has never taken. To the contrary, the Court has made it clear that it does not read *Illinois Brick* so broadly. For instance, the plaintiff in *McCready*, who purchased the defendant's health services from her employer, alleged that a conspiracy between the defendant and psychiatrists increased her costs for visiting a psychologist. 457 U.S. at 468-70, 102 S.Ct. 2540. The

defendant contended that after *Illinois Brick* only the employer who purchased the health plan should be permitted to sue, but the Court disagreed. It held that the chain-of-distribution inquiry in *Illinois Brick* was meant only to preclude duplicate recovery. While the employer might have suffered some economic injury (through, for example, paying higher wages to attract skilled workers in order to compensate for the illegally inferior benefits), its harm was distinct from the plaintiff's injury, her own out-of-pocket payments for psychological services. *Id.* at 475, 102 S.Ct. 2540.

While it is not identical to this case, *McCready* is helpful insofar as it recognizes that different injuries in distinct markets may be inflicted by a single antitrust conspiracy, and thus that differently situated plaintiffs might be able to raise claims. The injuries suffered by the copper traders who purchased inflated futures contracts from the defendants are distinct from any harm inflicted on Viacom when it paid inflated cash prices for cathode, or on Ocean View, to the extent it purchased copper rod from integrated producers. Other cases also demonstrate that the Supreme Court has been willing to entertain suits between plaintiffs and defendants not in privity with each other. *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 108 S.Ct. 1931, 100 L.Ed.2d 497 (1988) (plastic conduit manufacturer suing competitor steel conduit manufacturer); *National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85, 104 S.Ct. 2948, 82 L.Ed.2d 70 (1984) (university suing association that prohibited it from entering a television contract); *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741 (1959) (store suing competitor over refusal to deal).

The reason the plaintiffs' suit in *Illinois Brick* failed was not because the defendants did not sell to them. Rather, it was because the defendants did sell to a third party who (after *Hanover Shoe* ) could recover for any injury they claimed. The same paradigm applies in all of the cases cited by the defendants: Party A, the antitrust violator, sells to Party B, and then Party C, a down-stream purchaser from B, seeks to recover the implicit overcharges that B passed on to C. *See, e.g., Kansas v. UtiliCorp United, Inc.*, 497 U.S. 199, 207, 110 S.Ct. 2807, 111 L.Ed.2d 169 (1990) (public utilities but not residential customers to whom they sell may sue natural gas companies); *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 606 (7th Cir.1997) (drug wholesalers but not retail pharmacies to whom they sell may recover from manufacturers); *McCarthy v. Recordex Serv., Inc.*, 80 F.3d 842, 852-54 (3d Cir.1996) (attorneys may recover overcharges for copies, but the clients to whom they offer services may not); *In re Beef Indus. Antitrust Litig.*, 710 F.2d 216, 218 (5th Cir.1983) (packers who sell to grocers may recover for their unlawful conduct but feeders who sell to packers may not).

Here, in contrast, the plaintiffs are not indirect purchasers along a supply chain. As far as the plaintiffs' claims are concerned, Global, CLR, and Sumitomo did not sell cathode to integrated producers who in turn sold to any of the plaintiffs. Instead, the alleged conspiracy operated in the separate but related futures market, through which it sought directly to manipulate the price of copper the plaintiffs were buying. (It is true that Sumitomo Corporation made some sales of cathode, primarily overseas, to reap the benefit of its illegal futures market scheme. None of the plaintiffs, however, is seeking recovery on the basis of any of these cash

market sales; all rest solely on the manipulation of sales of futures contracts. *Sanner v. Board of Trade*, 62 F.3d 918, 929 (7th Cir.1995), discussed below, recognizes such a theory, and we see no reason why the mere existence of separate independent physical transactions should in any way change the analysis.)

The defendants repeatedly urge that the availability of recovery for copper futures traders who bought and sold from the defendants in that market should bar recovery for any plaintiff in the cash market. But this kind of an absolutist approach is ruled out by *Sanner*, which recognized at least one situation in which the futures market and physical market must be evaluated separately. The serious question here is whether these plaintiffs have presented another such instance.

In *Sanner*, a group of soybean farmers sued the Chicago Board of Trade alleging that the Board conspired with several individuals artificially to lower the price of soybean futures. The farmers suffered damages when they were forced to sell their soybeans into the cash market at correspondingly low prices. *Id.* at 921. The district court granted a motion to dismiss, finding as a matter of law that the farmers' injuries were indirect because the farmers did not participate in the futures market, that the causal chain between the cash and futures prices was too attenuated, and that damages were too speculative. *Id.* at 926.

This court reversed the dismissal. On the assumption (given the procedural posture of the case) that the farmers' allegations about the relation between the cash and futures markets were true, and that those market prices "tend[ed] to move in lockstep," we determined that the farmers had

suffered sufficiently direct injuries from the conspiracy to proceed with their case. *Id.* at 929- 30. We rejected the proposition that "participants in the futures market were more directly injured," so as to preclude recovery by farmers in the cash market and denied the defendants' claim that we should assume at the motion to dismiss stage that damages would be too speculative. *Id.* at 931. From the perspective of *Illinois Brick*, the *Sanner* court expressly found that in the context of a market manipulation scheme, damages inflicted on the physical commodity market were not derivative of injuries in the futures market. Unlike *Illinois Brick*, the harms incurred in the physical market during a market manipulation are not "secondary consequences arising from an injury to a third party." *Id.* at 929. Instead, they form a separate and compensable injury.

The defendants' reading of *Illinois Brick* is inconsistent with *Sanner*. Their claims to the contrary, there is no indication in *Sanner* that the plaintiff soybean farmers were in privity with the Board of Trade, and as a factual matter the assertion is surely wrong. The Board and its members did not sell soybeans to the farmers; like the defendants here they dealt solely with futures contracts. If *Illinois Brick* bars all recovery here, it should have barred recovery in *Sanner* and should also bar recovery in group boycott and other restraint of trade settings.

To put it another way, *Hanover Shoe*, *Illinois Brick*, and *McCready* make plain that the antitrust laws create a system that, to the extent possible, permits recovery in rough proportion to the actual harm a defendant's unlawful conduct causes in the market without complex damage apportionment. This scheme at times favors plaintiffs (*Hanover Shoe*) and at

times defendants *(Illinois Brick)*, but it never operates entirely to preclude market recovery for an injury. Applying those principles and the decision in *Sanner* to this case, we conclude that the evidence viewed favorably to the plaintiffs shows that damage from the defendants' conduct was felt in two separate markets: the futures market and the physical copper market.*** We have identified those who may recover in the futures market and must now turn to the more difficult

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*** The fact that the defendants were hoping to profit in the physical market, ultimately, through their manipulation of the separate futures market, also has implications for their arguments related to the so-called "umbrella standing" theory. The defendants object to the possibility that they might be held responsible for higher copper prices throughout the physical market, rather than just for the sales they made. If this were an ordinary cartel case, in which cartel members A and B sell to customers X and Y, and then non-cartel member firm C makes sales at or near the enhanced cartel price to customer Z, the question arises whether A and B are liable to Z for the overcharges it paid. See generally, ABA Section of Antitrust Law, 1 Antitrust Developments (Fourth) at 778-79 & n. 128 (1997) (collecting cases on umbrella standing). Here, however, we have a conspiracy to rig prices for the entire physical market, accomplished through manipulation of the Comex futures market. Another possible analogy might be to rigging product standards, which affects everyone who tries to participate in a particular product market. In the latter case, the defendants who manipulated the standards cannot be heard to complain that they should be immune from damages for a product they did not sell. We leave this issue open for further exploration at the district court level, now that we have clarified how the direct purchaser rule and the remoteness doctrine of *AGC* apply here.

question of establishing the proper plaintiff in the physical market. The defendants' answer (nobody) is not supported by *Illinois Brick*--or economics or fairness for that matter. Instead, we must be guided in our inquiry by the analytical framework and factors set out in *AGC*.

## V. Associated General Contractors

*AGC* requires a court to examine through a case-by-case analysis the link between a plaintiff's harm and a defendant's wrongdoing. 459 U.S. at 535-36, 103 S.Ct. 897. We are to consider a number of factors in this analysis, notably (1) the causal connection between the violation and the harm; (2) the presence of improper motive; (3) the type of injury and whether it was one Congress sought to redress; (4) the directness of the injury; (5) the speculative nature of the damages; and (6) the risk of duplicate recovery or complex damage apportionment. *Id.* at 537-45, 103 S.Ct. 897; *Sanner*, 62 F.3d at 927. The defendants concede only the second factor: they admit that each of the plaintiffs has adduced evidence sufficient to survive summary judgment that they intended artificially to inflate the price of both copper futures and physical copper in order to reap millions of dollars in profits. They contest each of the other points.

The first and third factors are discussed only cursorily by the defendants and can be dealt with adequately in the course of our analysis of the remaining three. For example, the defendants claim that there is no causal connection between their actions and any of the plaintiffs' harms because the plaintiffs' injuries are indirect (the fourth factor), and they argue that Congress had no intention of redressing this sort of injury because it is indirect and speculative (the fifth factor).

We therefore devote our attention to the other three factors, considering in the case of each plaintiff whether its injury was indirect and unpredictable, risked duplicate recovery, and would lead to speculative and complex damage apportionment. We begin with the claims of the Scrap Dealers.

**A. Scrap Dealers (Loeb, Nos. 00-3979, 01-1148)**

The Scrap Dealers face problems with all three of the contested *AGC* factors. First, whether or not they were in some sense original purchasers of physical copper, that fact alone is not enough to establish that their injury flowed directly from the defendants' market manipulations. An injury is still indirect if a plaintiff fails to establish a chain of causation between the harm it has suffered and the defendant's wrongful acts. *AGC*, 459 U.S. at 541, 103 S.Ct. 897. The directness inquiry further focuses on the presence of more immediate victims of an antitrust violation in a better position to maintain a treble damages action. "The existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement diminishes the justification for allowing a more remote party ... to perform the office of a private attorney general." *Id.* at 542, 103 S.Ct. 897.

There are numerous other parties who have suffered more direct injuries at the hands of the defendants than the Scrap Dealers suing here. Among them (though as we explain below not limited to them) are the Comex copper futures traders who have already filed and settled their claims with the defendants. But even in the physical copper market itself, the Scrap Dealers are quintessential examples of

indirect victims of antitrust injury. Although the copper distribution chain is exceedingly complex, even in the simplest possible version, an integrated producer such as Asarco will refine copper into cathode and sell it to a manufacturer, such as Viacom, Emerson, or Ocean View. The manufacturer will in turn transform the cathode into some product using copper and sell it down to the retail level. In the process, it may generate unused scrap copper, at which point the Scrap Dealers finally appear on the scene to buy the scrap. It is for these last purchases that the plaintiffs seek to recover damages.

But distributors and manufacturers have already entered into monetary transactions involving this same copper, and indeed we are faced in this very case with suits filed by some of those manufacturers. It is apparent that these companies at the least have suffered more direct injuries than the Scrap Dealer plaintiffs. This stands in marked contrast to *Sanner*, where the soybean farmers were clearly the most directly injured participants in the cash market because they were the only cash sellers of soybeans. *Sanner*, 62 F.3d at 927.

The speculative nature of the damages the Scrap Dealers have suffered also supports our conclusion that they cannot maintain this action. *See id.* at 542-43, 103 S.Ct. 897 (denying a claim that rested on an "abstract conception or speculative measure of harm"). The Scrap Dealers' economic experts have stated that they can tie a rise in the price of copper futures directly to price increases for physical copper through econometric analysis. Defendants argue to the contrary that a host of other factors are also at play, destroying the closeness of any link. Even accepting the

Scrap Dealers' position on this point, as we must at this stage of the litigation, it is difficult to know whether they have suffered any economic loss at all as a result of the defendants' actions. After all, the Scrap Dealers, middlemen who resell their scrap copper soon after they purchase it, are alleging that the defendants' market manipulations caused the price of copper to increase steadily from 1994 to 1996. Therefore, on most or all the sales the Scrap Dealers made in that time frame, which they contend are inflexibly linked to prevailing Comex prices, they should have made a slight profit because of Sumitomo's actions. Only when the price of copper plummeted in June 1996 would the Scrap Dealers have taken a bath in the resale market. And depending on how much copper the Scrap Dealers had on hand as compared to the number of transactions they made as the price of copper was increasing, it is possible that some of them may have suffered no true economic loss at all. In short, the exact nature of the damages they have suffered is speculative.

The Scrap Dealers attempt to counter this problem by arguing that damages can be set simply by computing the difference between the price of copper that should have prevailed on a given day absent Sumitomo's manipulations and the actual price for every copper transaction. This assertion, however, plunges the Scrap Dealers headlong into conflict with the sixth *AGC* factor, the problems of duplicate damage recovery and complex damage apportionment. The Scrap Dealers argue that they--and all other commercial purchasers of physical copper--should be permitted to recover damages equal to three times the overcharge caused by Sumitomo's scheme for every single sale of copper in the mid-1990s. But this proposition ignores the fact that the same piece of physical copper may be resold many times in a given

year as it is refined, distributed, turned into scrap, sold between scrap dealers, re-refined, and sold for scrap again. As mentioned above, every time a scrap dealer resold scrap copper during the two years at issue, it recouped the vast majority of its losses. Since defendants are not permitted to mount any sort of cost recovery defense along these lines, *see Hanover Shoe*, 392 U.S. at 491-94, 88 S.Ct. 2224, this would cause the Scrap Dealers to receive a damages award far in excess of any economic loss the defendants caused them. While *Sanner* permitted farmers to recover their soybean losses, it did not let millers, wholesalers, or retailers of soybeans also assert claims. It would be a significant extension of *Sanner* to allow these plaintiffs to sue, and it is one we decline to make.

The Scrap Dealers repeatedly argue that there are no duplicate damages in this case because their pricing decisions are based exclusively on Comex prices rather than a pass-on of historical costs. We fail to see why this fact should lead us to ignore the Supreme Court's command to prevent the duplicate recovery of antitrust injuries wherever possible. *AGC*, 459 U.S. at 544, 103 S.Ct. 897; *Greater Rockford Energy & Tech. Corp. v. Shell Oil Co.*, 998 F.2d 391, 396 (7th Cir.1993). The Scrap Dealers' contention that absent a pass-on of historical costs their injuries are "separate and distinct" defies economic reality. If a scrap dealer purchased a ton of copper when the Comex price was artificially inflated by $400, and the price subsequently rose another $200 prior to resale, it has reaped a $200 gain, not a $400 loss. The Scrap Dealers' own witnesses admitted that there is no pass-on only "if the current Comex price has moved in an adverse direction." Yet the evidence shows that Sumitomo's actions caused the Comex price to rise throughout the period

at issue in this case, making us skeptical that the Scrap Dealers have suffered any real loss at all.

The fact that the Scrap Dealers here are further down the chain of copper users than others also will increase the economic complexity of apportioning damages. Even the marketing manager of Loeb admitted that such factors as "freight costs, the sizing, sorting, packaging, purity requirements, length of time it took to get paid, [and] the risk of getting paid" all factored into Loeb's pricing decisions. While it might be possible for economists to factor out each of these considerations for all prior sales involving copper, the Supreme Court has decreed a simpler solution: simply restrict the right to recover to those who are more directly affected by the defendants' actions. *UtiliCorp*, 497 U.S. at 208-11, 110 S.Ct. 2807 (noting policy rationales for denying recovery even to those plaintiffs whose damages could be easily calculated). This description applies fully to the plaintiffs here. Because the Scrap Dealers have suffered an indirect injury causing them at best speculative damages that would lead to a strong possibility of duplicative recovery, we agree with the district court that they may not pursue their claims.

### B. *Viacom* and *Emerson* (No. 01-3485)

#### 1.

Many of the successful arguments from *Loeb* are echoed by the defendants in the *Viacom* action, but after a careful review of the record we find that the facts of the latter case compel a different result. The defendants' first argument for denying recovery to Viacom and Emerson (to whom we

will refer as "Viacom" except when distinctions between the two companies are important) is that Viacom has shown no evidence of direct and predictable harm stemming from the defendants' conduct. As we stated earlier, directness relates to the question whether there exists a chain of causation between a defendant's action and a plaintiff's injury or (in contrast) if the connection is based instead only on "somewhat vaguely defined links." *AGC*, 459 U.S. at 540, 103 S.Ct. 897. Global and CLR, the only defendants remaining in the Viacom action after Sumitomo's settlement, begin their attack by pointing out that the prices of copper cathode on the LME and Comex often diverged. We fail to see why this matters. Sumitomo purchased futures on Comex to drive up the price on that particular exchange artificially, and the prices Viacom paid for copper were directly based on Comex prices. The fact that Sumitomo also bought and sold futures on the LME and may have caused additional harms to physical copper purchasers who based their decisions on LME prices has no impact on Viacom's ability to recover under the *AGC* factors.

Next, the defendants rely on the fact that Viacom's purchases included not only a price linked to Comex but "a variety of discounts or premiums that, in response to changes in supply and demand, varied over time and among suppliers." The defendants' experts have opined that, through adjustments of premiums in response to supply and demand factors, the actual impact on the physical copper market of their illegal futures market activities is likely to be indirect and unpredictable.

While all of this might be so as a theoretical matter, on summary judgment it is our duty to evaluate the evidence in the record that Viacom presented. And that evidence paints

a starkly different picture. Viacom has introduced into the record both its contracts and its suppliers' published premiums. After a careful review of these materials, we are convinced that Viacom has established direct injury. In its contracts, Viacom purchased all but a *de minimis* amount of copper through the two-part formula we described earlier, consisting of (1) a base price equal to the Comex first position copper settlement price, and (2) a cathode premium, negotiated on a monthly or quarterly basis. Over the six years at issue here, the settlement price fluctuated from about 75¢ to $1.40 per pound. During the same years, the premium ranged from 2.75 to 3.50¢/lb. (Viacom does not seek recovery based on changes in premium prices; the complaint is based only on those caused by variations in the base price.)

The district court ruled that the base price and cathode premium were "inseparable." After a careful review of the record in the light most favorable to the plaintiffs, we are unable to agree with this characterization. All of the contracts specify that the payment price is determined by adding these two separately described components, and the values of both numbers throughout the relevant time period should be available through discovery. The district court also seems to have thought that the premium could in some cases be a discount off the Comex price. There is no evidence to support this; to the contrary, all of the evidence, including defendants' counsels' concession at oral argument, indicates that the premium was always a positive number. While Viacom appears to have been awarded volume and cash payment discounts in some instances, there is no indication that these discounts were tied to market conditions, and the defendants do not focus on such discounts in their briefs. Furthermore, the cathode premium was a small fraction of the

Comex price. In fact, the evidence shows that as the Comex price increased, the premium also increased. Thus, there is no possibility that the two components "offset" or that the premium somehow compensated for the defendants' manipulated price inflation. (Even if, counter- factually, the Comex price had for example risen by 65¢ and, to compensate, the base price dropped a penny, this could at best represent a mitigation of damages. But this would not make the injury any less direct.) The district court's conclusion on this point, which relied mainly on the testimony of an expert who had not even looked at Viacom's contracts, is both factually mistaken and fails to take the evidence in the light most favorable to Viacom. The presence of a small cathode premium does not negate the fact that the prices of cathode and cathode futures "tend to move in lockstep." Instead, the price reference in Viacom's contracts supports just such lockstep linkage. Our case law has never required that the cash and futures prices be identical to support recovery. It is only necessary that the relationship be direct, as it is here. *See Sanner*, 62 F.3d at 929.

Furthermore, the experts note that Comex quotes 24 different exchange prices at any given time and that the defendants' actions could have affected each of those prices differently. Accepting the truth of this statement, we do not see why it compels a finding that Viacom's injury is indirect. According to the record evidence, out of this menu of prices, Viacom used just one (the monthly settlement price) as the basis for all but a minuscule number of its contract purchases, and Emerson used only two. While acknowledging this, the defendants contend that other cathode purchasers could have used different or widely varying systems. Perhaps they did, and if so perhaps they should be found to be improper

plaintiffs under the antitrust laws, though that is an issue for another day. But this fact does not weaken the direct causal chain between the defendants' actions and these particular plaintiffs' harm and is no more reason to deny Viacom and Emerson recovery than the fact that some purchasers might have bought cathode at prices not tied to those on either Comex or the LME.

Similarly, we reject the defendants' argument that because a number of Viacom's contracts contained clauses permitting the parties to renegotiate the base price if they believed that Comex prices did not accurately reflect market conditions, Viacom's injuries are somehow remote and indirect. It is undisputed that, because of the success of the defendants' conspiracy, Viacom and its integrated suppliers were never aware of the artificial Comex inflation and so never took advantage of this clause. Instead, Viacom based all of the purchases for which it seeks recovery directly on Comex.

We also believe that, contrary to the defendants' contentions, our holding on this point is entirely consistent with the Second Circuit's decision in *Reading Indus., Inc. v. Kennecott Copper Corp.*, 631 F.2d 10, 13-14 (2d Cir.1980). There, the plaintiff, a refiner of scrap copper, alleged that the defendant-integrated producers had conspired to keep the price of refined copper low and that this conspiracy injured it by artificially raising the price of scrap. *Id.* at 12. The court found the injury indirect because it "depend[ed] upon a complicated series of market interactions," including the actions and pricing decisions of refiners, fabricators, dealers, speculators, and consumers of copper. *Id.* at 13. Such "conjectural theories of injury and attenuated economic

causality" were enough to render Reading's injury indirect. *Id.* at 14.

Other than the fact that both *Reading* and the present case involve price- fixing conspiracies in the physical copper market, we find little similarity between them. The injury here does not depend on the speculative actions of innumerable market decision makers. It flows instead directly from the contracts between Viacom and its suppliers. It is this contractual linkage, absent in *Reading*, that prevents other market variables from miring a trier of fact here in "intricate efforts to recreate the possible permutations in the causes and effects of a price change." *Id.*

In sum, Viacom's contracts and the other record evidence establish a direct relation between the defendants' illegal scheme and Viacom's harm. The contract price it paid its suppliers for copper was directly and explicitly based on the Comex monthly settlement price, and therefore the defendants' manipulations directly and predictably had an impact on that price. *Amarel v. Connell*, 102 F.3d 1494, 1512 (9th Cir.1997) (injury direct where price of milled rice directly affected price of paddy rice); *Sanner*, 62 F.3d at 929. Any variations in the cathode premium moved in the same direction as the manipulation and could not have limited or mitigated this harm. For these reasons, Viacom has established the directness element of *AGC*.

**2.**

We turn next to the district court's other major reason for granting the defendants summary judgment: its belief that opening the door to Viacom's suit would inevitably lead to

either duplicate recovery or complex damage apportionment. *See AGC*, 459 U.S. at 544, 103 S.Ct. 897. The court cited at least three manifestations of this problem, all involving Viacom's integrated suppliers, such as Asarco. First, it believed that Viacom's claim would duplicate Asarco's because Asarco could assert claims for its raw material purchases from third parties, and those raw material prices are tied to Comex. Second, because Asarco purchased some cathode from third parties, both it and Viacom would be permitted to recover and duplicate each other's damages. Third, Viacom's claim would duplicate Asarco's because Asarco hedged by purchasing put options on Comex. In addition to those three points, the court noted that Asarco has recovered damages in a California state court class action, and it thought that this too should preclude Viacom from recovering.

We begin with the defendants' claim that Asarco's purchase of raw materials, such as ore, concentrate, blister, and anode, all of which it transformed into cathode, should bar recovery. This does not follow. Practically every product is created through the use of some kind of raw materials, but that fact does not prevent the direct purchaser of the finished product from suing its manufacturer under the antitrust laws, as long as the direct purchaser is not trying to attack a price-fixing arrangement at the raw materials level. The defendants' own experts testified that while raw material prices "may be indirectly affected" by price manipulations, a squeeze or corner on cathode-- the only copper product traded on Comex and the LME--would not directly harm purchasers of these raw materials. Instead, raw material prices vary widely and contain various discounts off the Comex price to account for such factors as the expected cost of conversion

into cathode, which in turn varies based on supply, demand, and current refining and smelting capacity.

We agree with the broad proposition that a party cannot recover when others more directly injured are better able to state a claim. *AGC*, 459 U.S. at 544-45, 103 S.Ct. 897. Indeed, we have just applied this very principle to deny recovery to the Scrap Dealers, who are farther down the chain of resale, even though scrap prices too are tied to Comex. For parallel reasons, raw materials purchasers are also ill-suited to bring an antitrust claim. Permitting both raw materials purchasers and cathode purchasers in the same line of distribution to recover would lead to duplicate damages in violation of the *Illinois Brick* rule. The solution to this problem, however, is not to deny a right to recover to everyone. Such a draconian rule would give a green light to antitrust scofflaws to conspire to fix prices in a particular market and would create incentives to engage in antitrust conspiracies in markets with complicated distribution structures. Instead, the proper course is to recognize only the best of the several potential plaintiffs who otherwise satisfy the requirements for bringing suit under the antitrust laws. Because raw materials prices will vary in comparison to Comex prices much more than will the price of physical cathode, physical cathode purchasers such as Viacom are better situated than raw materials purchasers to pursue a claim in the physical market. This logically implies that raw materials purchasers up the chain from cathode sales could not satisfy *AGC*, just as we found to be the case for the downstream Scrap Dealers. In between, however, lies the physical market transaction at the heart of the defendants' scheme--the purchase of cathode. There are no better parties

than these purchasers to pursue a claim, and it is therefore they who are proper plaintiffs.

More bite lies in the argument that recovery should be denied because some of the cathode Asarco sold Viacom was purchased before, although this claim is not as strong as it might at first appear. As the district court noted, some if not most of the cathode Viacom purchased had never before been purchased in cathode form. Asarco sold Viacom 510 million pounds of cathode between 1990 and 1996. During that time frame, Asarco refined 6.4 billion pounds of cathode and purchased 153 million pounds from third parties, about 2.3% of its output. Because copper is fungible, one cannot tell whether any given Viacom purchase of cathode consisted of cathode refined by Asarco or previously purchased product.

We do not believe the mere existence of third-party cathode presents such a risk of duplicate recovery as to justify the extreme step of denying recovery altogether. Had the Board of Trade in *Sanner* produced evidence that farmers on some rare occasions bought soybeans from neighboring farms and then resold them along with the soybeans they grew themselves, that would not have provided a reason to deny recovery entirely. Similarly, if Viacom can prove at trial that 97.7% of all copper Asarco sold it was cathode it had refined itself, then Viacom should be permitted to recover 97.7% of its proved damages from cathode purchases. *Cf. Paper Sys., Inc. v. Nippon Paper Indus. Co.*, 281 F.3d 629, 633 (7th Cir.2002) (carving out indirect purchases while still leaving open possibility of recovery for direct purchases). The physical copper market is complicated, but not so complicated that one cannot estimate to a reasonable degree of accuracy the amount of damage a party has sustained. It is certainly

acceptable through expert economic testimony to make a reasonable estimation of actual damages through probability and inferences. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 124, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969). "Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty it would be a perversion of fundamental principles of justice to deny all relief to the injured person." *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563, 51 S.Ct. 248, 75 L.Ed. 544 (1931). While we are not permitted to make *complex* damage apportionments in antitrust cases, *AGC*, 459 U.S. at 544, 103 S.Ct. 897, nothing about these calculations is inordinately complex. One need only know two pieces of information: the amount of cathode purchased by Viacom and the amount of cathode purchased and sold by those who sold cathodeto Viacom. From there, reasonable estimates of damages are the order of the day. Because this estimation is not overly complex and will not lead to duplicate damages, it provides a sufficient basis at this stage for the case to proceed to the merits.

The defendants' next major attack rests on hedging. Commodities exchanges function in part to protect participants in a physical market by shifting some of the risk (and damage) caused by fluctuations in price to participants in the futures market. Extending this principle, Global and CLR claim that through an extremely complicated set of economic interactions between the cash and futures markets, the damages experienced in the physical cathode market will be duplicated in their entirety by damages suffered in the futures market. Therefore, only futures traders, and not cash market participants, should be permitted to recover.

The hedging theories advocated by the defendants are based on economic theory, with no specific application of that theory here that would correlate sales in the cash market and sales in the futures market. Notably, Viacom's individual purchases from its suppliers were not hedged. Neither Viacom nor Asarco purchased a futures contract as a hedge every time they exchanged copper. Had they done so, then perhaps one might be able to "match" each physical market transaction to a futures contract sale and argue that the opportunity for a trader to recover the overcharge in a federal lawsuit should preclude recovery for the overcharged physical market participant. Emerson's supplier, Phelps Dodge, did hedge some of its sales to Emerson. On remand, the district court should explore further whether these hedging transactions would lead to some degree of duplicate recovery and a corresponding need to reduce damages. Nevertheless, since our review of the record indicates that not all of Phelps Dodge's sales were hedged, we conclude that Emerson is an appropriate plaintiff for the same reasons as Viacom.

In any event, the kind of futures matching the defendants' postulate does not reflect the way that most hedging works in the copper futures market. Asarco did not buy futures. Instead, it purchased put options. Put options are strategic hedges designed to protect against a general risk of declining cathode prices. With a put option, Asarco had the right, but not the obligation, to sell a futures contract if the price fell below a certain "strike" price. *See United States v. Catalfo*, 64 F.3d 1070, 1072 (7th Cir.1995). But as the defendants were artificially inflating the price of cathode throughout the period at issue here, the price never would have fallen below the strike price. Therefore, no sale ever would have gone forward and the only damages Asarco would

have suffered from the conspiracy would have been the cost of the put option, or, more properly, the amount by which the price of the put option changed because the price of copper was artificially high.

The defendants and their experts have made no attempt to correlate the damages Asarco could theoretically recover on the futures market for its put options to the specific damages sought here by Viacom, and the relationship is far from intuitively obvious. Instead, the experts trace the potential for hedging by numerous parties upstream and downstream from Viacom and contend that because so many participants in the copper industry use so many different forms of hedging there will be "inevitable" duplication between the cash and futures markets.

This sort of potential duplication bears no resemblance to the duplication rejected in *Illinois Brick* and *AGC*, 459 U.S. at 544, 103 S.Ct. 897, nor do we think that it independently provides a reason to deny recovery to Viacom. In *Illinois Brick*, any "pass-on" of damages would (because of *Hanover Shoe*) already be taken into account in its entirety in the recovery to another potential party, the direct purchaser. 431 U.S. at 737-38, 97 S.Ct. 2061. This simply is not the case here. Asarco strategically hedged only about half its output. The defendants claim that potential hedging by those parties to whom Viacom sold and from whom Asarco purchased raw materials is also relevant, but this cannot be so under *Sanner*. There we held that injuries incurred in futures market purchases not linked to any particular cash market purchases did not "duplicate" and were not more "direct" than the cash market injuries. 62 F.3d at 929-30. Because there are two separate markets, each with compensable

injuries, the opportunity for recovery in one market does nothing to alleviate the harm in the other. For similar reasons, the fact that Comex futures traders have received money in a now-settled lawsuit says nothing about the ability of Viacom or other similarly situated plaintiffs in the cash market to recover.

Finally, the defendants note that Asarco and three of the manufacturers' other suppliers have recovered in a lawsuit brought in California state court. This lawsuit was brought pursuant to California law, which permits suit by indirect purchasers. *Union Carbide Corp. v. Superior Ct.*, 36 Cal.3d 15, 201 Cal.Rptr. 580, 679 P.2d 14, 16 (1984). However, the supposed "duplication" here comes from different bodies in our federal system seeking to remedy separate harms. It presents no risk of duplicate recovery for the same injury under the same law and is thus no bar to the plaintiffs' recovery. *See Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 109 S.Ct. 2909, 106 L.Ed.2d 219 (1989) (upholding award of both federal antitrust and state tort damages); *California v. ARC Am. Corp.*, 490 U.S. 93, 109 S.Ct. 1661, 104 L.Ed.2d 86 (1989) (permitting states to require offenders to pay both state damages to indirect purchasers and federal treble damages to direct purchasers). If the resolution of the state court action poses a problem at all to these plaintiffs, it would be in the nature of claim or issue preclusion. *See Matsushita Electric Indus. Co. v. Epstein*, 516 U.S. 367, 116 S.Ct. 873, 134 L.Ed.2d 6 (1996); *Marrese v. American Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 105 S.Ct. 1327, 84 L.Ed.2d 274 (1985). It is possible that the defendants have waived their right to assert any such defense; it is not mentioned in their briefs before

this court. Accordingly, we express no opinion at this time on the merits of any preclusion argument.

In sum, of all participants in the physical market, Viacom and other first purchasers of cathode are the only plaintiffs possibly situated to recover damages against the defendants for the anti-competitive harms they have inflicted on the physical market for copper cathode. Faced with the option of permitting a clear, non-speculative harm to the cash market to go unremedied or of allowing the plaintiffs' suit to go forward, we elect the latter. As narrowed to first purchases, there is no danger of duplication of recovery, and so, under *AGC* and *Sanner*, the claim should proceed to trial.

**3.**

The final broad claim of the defendants is that recovery of damages in this case simply would be too speculative and complex to warrant allowing this suit to proceed. *Cf. AGC*, 459 U.S. at 542, 103 S.Ct. 897. Based on the evidence adduced by Viacom, however, we disagree. The main complication will come from attempting to discern how much of the Comex price of copper at a given time represented an overcharge due to the defendants' manipulation and how much stemmed from normal economic forces. This difficulty, however, occurs in every price-fixing case. It is no different from the task of gauging the damages recoverable by Comex futures traders, whom defendants have conceded to be proper plaintiffs. Through discovery, economic experts can evaluate the impact of the defendants' illegal actions on the futures market and come to reasoned conclusions. *Cf. Sanner*, 62 F.3d at 930 (rejecting claim that damages analysis in a market manipulation is "beyond the ken

of the federal courts"). At that point, recovery could be calculated by reviewing all of Viacom's contracts (assuming they are similar to the ones already in the record) and assessing damages based on the already computed overcharge. Since the only other factors involved in setting the price of Viacom's cathode are items which have no relation to the Comex price, such as freight charges and cash payment discounts, and the cathode premium, for which Viacom does not seek to recover, there should be no problems as a theoretical matter with making these calculations. The mere fact that each individual transaction relevant to an antitrust scheme must be examined on a case-by-case basis to assess damages does not thereby render those damages speculative. *American Ad Mgmt., Inc. v. General Tel. Co. of Cal.*, 190 F.3d 1051, 1059 (9th Cir.1999).

We fully recognize that perfecting such economic analysis, tracking every pound of cathode refined or purchased by Viacom's suppliers, and locating every cathode contract Viacom entered into over a six-year span will not be easy. But complex litigation is hardly new for the federal courts, whether it is in the field of antitrust, environmental clean-ups, pension law, or accounting frauds. The key here is that the damages are not inherently speculative in the sense that *AGC* used that term. *See* 459 U.S. at 542, 103 S.Ct. 897. Nor, as in *Illinois Brick* or *Hanover Shoe*, is a party asking a jury or the district court to perform some form of econometric analysis to deduce whether all, some, or none of an overcharge was passed on down a chain of distribution. *Illinois Brick*, 431 U.S. at 727, 97 S.Ct. 2061. Instead, one need only determine through available records what percentage of cathode bought by Viacom represents first purchases. This is not speculative or complex, only

time-consuming, and we are confident that the parties and their counsel are up to the task.

The defendants' entire case theory, apparent not only here but also through their discussion of duplication and hedging, seems to be the troubling one because their scheme was so evil, went undetected for so long, and caused so much economic loss throughout the cash market, that we should simply give them a pass from the antitrust laws. This is not now and never has been the law. Since the days of *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 379, 47 S.Ct. 400, 71 L.Ed. 684 (1927), it has been established that in complicated antitrust cases plaintiffs are permitted to use estimates and analysis to calculate a reasonable approximation of their damages. While we fully agree that we should not use the massiveness of defendants' conspiracy as an excuse to punish them unduly (by, for example, permitting the Scrap Dealers in *Loeb* to recover for harms that would duplicate those of Viacom), the sensible solution is to let one--but only one--level of purchasers in the physical copper market recover. Based on all the evidence available on summary judgment, the best plaintiff in this market is the first purchaser of copper cathode, and Viacom and Emerson are prototypical examples of such plaintiffs. The district court erred in dismissing the case at this stage, and we must therefore reverse its judgment.

### C. *Ocean View* (Nos. 01-3229, 01-3230)

We turn to the final plaintiff, Ocean View. We have already rejected the defendants' principal argument for affirming summary judgment in this case, that the action is barred by the *Illinois Brick* direct purchaser rule. For the

same reasons discussed in connection with Viacom's action, there is no party along a chain of distribution between Ocean View and any of the defendants who can recover for an alleged overcharge. Therefore, *Illinois Brick* is inapplicable. Instead, this case is controlled by the basic premise of *Sanner*, 62 F.3d at 929-30, which holds that a cash market participant injured by a party's illegal actions in the futures market may, in some instances, sue that party under the federal antitrust laws. The controlling factors in this inquiry are those set out in *AGC*, 459 U.S. at 537-45, 103 S.Ct. 897. The defendants allege that under an analysis of these factors, Ocean View's claim should still be precluded, while Ocean View contends that it should be entitled to recover for every copper rod it has ever purchased, or, in the alternative, that it may recover at least for those instances where it was the first purchaser of copper in cathode form.

As with the Scrap Dealers, we must reject Ocean View's proposition that it can recover for rod manufactured from cathode purchased by others, such as its semi-fabricators. Such an injury would be indirect because the semi- fabricator would serve as a more immediate victim of the antitrust violation intended to affect the cash and futures markets for cathode. *AGC*, 459 U.S. at 541-42, 103 S.Ct. 897; supra at 484-85. Semi-fabricators who purchased cathode would stand in shoes similar to those of Viacom, purchasing large quantities of cathode to reshape and sell as rod or wire. Because they are well-situated to bring any claim for inflation in the physical market, there is no need for Ocean View, as a more remote party, to step in "to vindicate the public interest in antitrust enforcement." *AGC*, 459 U.S. at 542, 103 S.Ct. 897.

Additionally, granting recovery to both a semi-fabricator for its cathode purchase and Ocean View for its purchase of that same cathode reshaped as rod would lead to either duplicate recovery or complex damage apportionment in violation of the principles underlying *AGC*. 459 U.S. at 544, 103 S.Ct. 897. We have already rejected the claim that the copper market should not be subject to a ban on duplicate recovery because copper pricing decisions are based on Comex and not a "pass on" of historical costs, *supra* at 486. To avoid such duplicate recovery one must either attempt to apportion damages along a chain of distribution, forbidden by *AGC*, or deny the right to sue to all but one plaintiff along the chain of distribution.

The best-situated plaintiff to recover is the first purchaser of copper cathode, the specific commodity the defendants targeted in their futures market conspiracy. For such a plaintiff, it is possible both to avoid duplicate recovery problems and at the same time to ensure that antitrust harm perpetrated in the cash market will not go unremedied. Based upon on our review of the record, we are satisfied that in at least some cases Ocean View did purchase cathode refined by integrated producers. The existence of such purchases is enough to get Ocean View in the door; recovery should not be denied simply because a plaintiff may not receive damages as high as it would like. The quantity of such sales, and thus the eventual damages Ocean View might get if it manages to prove the rest of its case, can await further discovery. Like Viacom, Ocean View will have the burden of ascertaining what percentage of the cathode sold by these producers was refined by them and not purchased from third parties. If, as defendants fear, many of these records are lost, that fact will come out in discovery, and they may move for a missing

evidence instruction or perhaps even summary judgment on the merits.

We have already rejected most of the other claims the defendants make for denying Ocean View recovery, including the proposition that the integrated producers' purchase of copper raw materials should somehow render them improper plaintiffs, *supra* at 489, and the claim that hedging on the copper futures markets by some physical market participants renders the injury indirect or duplicative, *supra* at 491-92. Finally, we have found that the damages claimed are not too speculative or complex, *supra* at 492-93.

At this point we can think of only one possible distinction between Ocean View and Viacom that deserves further comment. That is the fact that while Viacom purchased cathode, Ocean View bought cathode that had been tolled into rod. The parties do not focus on this distinction much in their briefs, and the defendants concede that there is no physical difference between cathode and rod other than the product's shape. Based upon our review of the contracts in the record, the price Ocean View paid its integrated producers for rod appears to be identical to that paid by Viacom for cathode except for the existence of an additional rod premium. We assume, since the defendants do not contend otherwise, that like the cathode premium, the rod premium is a small fraction of the total price paid and tends to increase as the Comex price increases, so that it does not in some way offset the Comex inflation or render the injury indirect. In that case, the similarities between cathode and rod are close enough that, in instances where the same integrated producer refines raw materials into cathode and then shapes it into rod, Ocean View, as the first purchaser after the materials are

formed into cathode, can state a claim, regardless of whether that copper is then in the form of cathode or rod. *Cf. In re Sugar Indus. Antitrust Litig.*, 579 F.2d 13, 17-18 (3d Cir.1978) (finding no distinction for *AGC* purposes between price-fixed sugar and candy incorporating that price-fixed sugar sold into the market for the first time).

## VI.

In addition to their points under *Illinois Brick* and *AGC*, the various plaintiffs make arguments specific to their own cases. Most of these involve procedural issues. We consider these points in turn, on an issue-by-issue basis.

### A. RICO and State Law Claims

We begin once again with the *Loeb* action. Our determination that the *AGC* factors prevent the Scrap Dealers from pursuing their antitrust claims disposes of their remaining claims against Sumitomo and Global for violations of RICO and state law. It is also dispositive of all claims against JPMorgan Chase.

The district court dismissed the Scrap Dealers' RICO claims on the ground that the *AGC* factors apply equally to RICO. The Scrap Dealers, however, argue that even if their antitrust claim fails, their RICO case should proceed. This claim lacks merit. Civil RICO was modeled after the *Clayton Act. Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 267-69, 112 S.Ct. 1311, 117 L.Ed.2d 532 (1992). To satisfy its requirement of proximate causation, the Scrap Dealers must allege a relation between their injury and the defendants' violation that is neither indirect nor remote.

*International Bhd. of Teamsters, Local 734 Health & Welfare Trust Fund v. Philip Morris, Inc.*, 196 F.3d 818, 825 (7th Cir.1999) (applying *AGC* factors to a proximate causation analysis). Since we have already determined that the Scrap Dealers' injury is too indirect and remote under *AGC* for antitrust purposes, we conclude that the relation is similarly too remote for RICO purposes.

The Scrap Dealers also assert that the district court erred in finding that they had abandoned their state law claims. On this point, they appear to be correct. There is certainly no evidence in the record that the Scrap Dealers voluntarily dismissed or failed to pursue their various state law claims. The defendants argue that these claims were abandoned when the Scrap Dealers attempted to certify a class for the federal antitrust claims but not for the state claims. But no inference of abandonment should flow from a limited request for a class action; to the contrary, Fed. R. Civ. P. 23(c)(4)(A) specifically recognizes that "an action may be brought or maintained as a class action with respect to particular issues." It would be entirely consistent with the rule to seek certification on issues governed by federal law, while declining to do so for more particularized state law issues. Nevertheless, the fact remains that we have dismissed all of the Scrap Dealers' federal claims against Sumitomo and Global. Since the Scrap Dealers have asserted no independent basis for federal subject matter jurisdiction, it is entirely appropriate to dismiss the state law claims, though without prejudice. *See* 28 U.S.C. § 1367(c)(3); *Oates v. Discovery Zone*, 116 F.3d 1161, 1173 n. 12 (7th Cir.1997).

**B. Issue Preclusion: JPMorgan Chase**

The district court dismissed the Scrap Dealers' claims against JPMorgan Chase on issue preclusion grounds. To prove that issue preclusion applies, the defendant must establish that (1) the plaintiff was fully represented in the prior litigation, (2) the issues to be precluded are identical to those in the prior litigation, (3) the issues were actually litigated and decided on the merits, and (4) resolution of the issue was necessary to the judgment. *People Who Care v. Rockford Bd. of Educ.*, 68 F.3d 172, 178 (7th Cir.1995). The Scrap Dealers' claims against JPMorgan Chase arise from an alleged conspiracy between JPMorgan Chase and Sumitomo in which JPMorgan Chase's metals desk somehow furthered the conspiracy through its own copper purchases on the LME. The issue the defendants sought to preclude, that of the Scrap Dealers' ability to recover as a proper plaintiff under the antitrust laws, was actually litigated and decided on the merits in their suit against Sumitomo. That is enough to bind the Scrap Dealers, who have now had their day in court, with respect to JPMorgan Chase as well.

The Scrap Dealers argue, however, that their day in court was flawed, because they did not have an opportunity to litigate these issues fully before the district court. Their only support for this contention is the fact that the district court turned Sumitomo's motion to dismiss into a summary judgment motion without notice to them. As we have already noted, this action by the district court, while in error, did not prejudice the Scrap Dealers. The antitrust issues were fully litigated by counsel, albeit at the class certification stage. Besides this, the district court gave the Scrap Dealers an opportunity for a hearing prior to dismissing the JPMorgan

Chase claims at which they were invited to bring forth any additional arguments that would call into question the district court's prior grant of judgment to the defendants. The Scrap Dealers produced no new evidence at that time that would call into question the factual basis for that determination. Therefore, we affirm the district court's decision to dismiss all claims brought by the Scrap Dealers against JPMorgan Chase on issue preclusion grounds.

### C. Statement of Claim Against CLR

CLR advances one final argument in support of the judgment in both *Viacom* and *Ocean View*, which applies only to itself and not to its co- defendants. The district court stated in the *Viacom* action that, while it would not "address the issue in any detail," it believed that Viacom had made an inadequate showing that CLR's activities in any way affected the prices Viacom paid for copper. CLR urges this as an alternate ground for affirmance.

The procedural history of this argument is complex and seems to have engendered a great deal of enmity between the parties. The parties filed cross-motions for summary judgment on the standing question in the *Viacom* action. In its lengthy joint motion with Global, CLR never argued that its role in the conspiracy was too attenuated to have directly affected the Comex price. The issue was first raised in CLR's response to Viacom's cross-motion. Viacom, in reply, pointed to evidence in the record that addressed this new argument. The district court struck these submissions as untimely. This, however, was in error. Viacom had no obligation to produce specific evidence of CLR's role to survive CLR's motion for summary judgment since the issue

was never raised by CLR at that stage. *Aviles v. Cornell Forge Co.*, 183 F.3d 598, 604-05 (7th Cir.1999). Because CLR raised this argument in an untimely manner, the district court should not have considered it as a ground for summary judgment without giving Viacom "notice and a fair opportunity to present arguments and evidence in response." *Id.* By striking the materials Viacom submitted, the district court denied just that opportunity. Of course, since we are remanding this case on other grounds, the issue may resurface again after further discovery. At that point, considering all evidence in the record, the district court may properly evaluate--after considering all record evidence--whether either Viacom or Ocean View has presented enough to connect CLR to any violation of the antitrust laws. For the foregoing reasons, we also deny CLR's motion to strike.

**D. Aiding and Abetting: JPMorgan Chase**

Another minor issue crops up only in *Ocean View*, but it too can be disposed of easily. JPMorgan Chase asserts that the district court incorrectly denied its motion to dismiss on the ground that the complaint failed to state a claim against it because it only aided and abetted the conspiracy between Sumitomo and Global. But Ocean View is not attempting to state an "aiding and abetting" case. Its allegation is that JPMorgan Chase was a participant in the conspiracy to manipulate the copper market. To state such a claim, Ocean View need only prove that JPMorgan Chase knew Sumitomo intended to restrain trade, intended that trade be restrained, and materially contributed to that restraint. 7 Phillip E. Areeda, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, ¶1474a (1986); *Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464, 470, 82 S.Ct. 486, 7

L.Ed.2d 458 (1962). A broad reading of the complaint alleges this and more. It states that JPMorgan Chase, aware that Sumitomo was manipulating futures prices, provided services and loans at well above-market prices to finance and hide Sumitomo's activities. JPMorgan Chase also allegedly stonewalled and lied to regulators and otherwise helped Sumitomo in an attempt to avoid investigations, all the while profiting handsomely on its deal. Of course, after merits discovery, it may come to pass that Ocean View lacks the evidence to establish any of these claims. But accepting the allegations as true, it is entitled to proceed.

**E. Reinstatement of Claims**

Only a few brief housekeeping matters remain. In both *Viacom* and *Ocean View*, the district court also granted the defendants summary judgment on their RICO and fraud claims because RICO contains rules similar to the Clayton Act for identifying proper plaintiffs. *International Bhd. of Teamsters*, 196 F.3d at 825. Having found that the plaintiffs here may pursue their antitrust claims, the RICO claims must be reinstated as well. The same goes for the state law claims. They were dismissed without prejudice in *Viacom* only because all federal claims had dropped out of the case. Finally, in *Ocean View*, the district court dismissed Ocean View's claim under Rhode Island state law on the ground that Rhode Island law imposed standing requirements similar to those of federal law. Expressing no opinion on the merits of that determination, we note that since we have found that Ocean View may proceed on at least some of its claims under federal law, the dismissal of the Rhode Island claim on similar grounds must be reconsidered.

## VII.

To summarize, we MODIFY the dismissal of the state law claims in No. 00-3979 to reflect that this dismissal was without prejudice. In all other respects we AFFIRM the judgment of the district court. We also AFFIRM the judgment in No. 01-1148. On the other hand, we find that Viacom, Emerson, and Ocean View are not indirect purchasers under *Illinois Brick*, and their injury is direct, predictable, and unlikely to produce duplicate recovery or speculative damages. Therefore, in Nos. 01-3229, 01-3230, and 01-3485, we REVERSE the judgment of the district court and REMAND for further proceedings.

## CONCURRING OPINION

CUDAHY, *Circuit Judge*, concurring in Nos. 00-3979 and 01-1148 and concurring in the judgments in Nos. 01-3485, 01-3229 and 01-3230. I join in the outcomes reached by the majority in the several cases, but I write separately to question the appropriateness of finding a "lockstep" relationship between the copper futures and cash markets in the analysis of the claims of Viacom, Emerson and Ocean View.

The analysis and outcome in *Sanner* (which relied on the allegations of a complaint, not a summary judgment record) were based on the thesis that the futures market and the cash market tended to move in "lockstep." Thus, the relationship of futures prices of soybeans on the Chicago Board of Trade and the cash price of soybeans to be realized by farmers could be assumed to be simple, direct and absolutely predictable. "The futures market and the cash

market for soybeans are ... 'so closely related' that the distinction between them is of no consequence to antitrust standing analysis." 62 F.3d at 929. Based on the complaint, there could be no question that a given manipulation of the futures market produced a precisely proportionate consequence in the cash market.

This is hardly the case with the Comex and the market for physical copper. Even though the majority attempts to minimize the departures from a fully direct relationship between the futures and the physicals market (and takes issue with the more critical analysis of these relationships by the district court), under either view "lockstep" becomes more a slogan than a fact. And, of course, it was the existence of a "lockstep" relation that apparently excused *Sanner* from the strictures of *Illinois Brick v. Illinois*, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977) and squared it with *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983). The existence, in the case before us, of a negotiable premium (or discount) as part of the price is enough in itself to remove this relationship from the "lockstep" category. And, if the language of *Kansas v. UtiliCorp United, Inc.*, 497 U.S. 199, 216, 110 S.Ct. 2807, 111 L.Ed.2d 169 (1990) about the undesirability of exceptions to *Illinois Brick* were to be applied here, the outcome might be in doubt.

With respect to the possibility of duplicative recovery, *Sanner* is also quite distinguishable. There the plaintiff-farmers produced the commodity, bought none of it and there was no trade in any precursor raw material. Here the plaintiff-manufacturers bought from integrated producers,

which purchased from others substantial quantities of copper cathode and pre- cathode copper raw material (the price of which also tended to follow the copper futures market).

I believe, therefore, that the case before us, although it seeks to apply *Sanner*'s principle, may be a major step beyond *Sanner*. The outcome, however, may be justified insofar as there is sufficient evidence that the defendants engaged in massive physical cathode transactions and intended to manipulate physical prices as well as futures prices and thus to injure purchasers such as the plaintiffs. *See Sanner*, 62 F.3d at 929 ("even if we were to assume ... that there is a distinction between markets that is relevant to antitrust standing, the farmers here have alleged that one of the CBOT's objectives in adopting the Resolution was to prompt a price decline in the cash market for soybeans.").

## APPENDIX B

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF WISCONSIN**

**IN RE COPPER ANTITRUST LITIGATION**
**M.D.L. Docket No. 1303**

**[Filed August 24, 2001]**

| | |
|---|---|
| VIACOM, INC., as successor by merger to CBS Corp. (f/k/a Westinghouse Electric Corp.), and EMERSON ELECTRIC CO., Plaintiffs, | ) |
| v. | ) |
| SUMITOMO CORPORATION, SUMITOMO CORPORATION OF AMERICA, GLOBAL MINERALS AND METALS CORPORATION, R. DAVID CAMPBELL, and CREDIT LYONNAIS ROUSE, LTD., Defendants. | ) |

**OPINION AND ORDER**
**99-C-0621-C**

Plaintiffs Viacom, Inc. and Emerson Electric Co. brought this civil action against defendants Sumitomo, Inc., Sumitomo Corporation of America, Global Minerals and

Metals Corporation and Credit Lyonnais Rouse under §§ 4 and 12 of the Clayton Act, 15 U.S.C. §§ 15 and 26, for violation of § 1 of the Sherman Act, 15 U.S.C. § 1. Plaintiffs contend that defendants conspired to raise the price of copper to artificially high prices by manipulating the copper futures market on the London Metal Exchange and the Comex division of the New York Mercantile Exchange and through the acquisition of warrants for physical copper cathode in the United States and abroad. Plaintiffs have added claims against defendants for violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), federal common law and various state unfair trade practice and antitrust laws. The Sumitomo defendants have settled this action, leaving only defendants Global and Credit Lyonnais as defendants.

Jurisdiction over the federal antitrust, RICO and federal common law claims is present, pursuant to 28 U.S.C. § 1331. Jurisdiction over the state unfair trade practice and antitrust claims exists by virtue of supplemental jurisdiction. 28 U.S.C. § 1367.

The case is before the court on defendants' motion for summary judgment on all of plaintiffs' claims and on plaintiffs' motion for partial summary judgment on the issue of antitrust standing only. I conclude that plaintiffs lack standing to pursue their antitrust claims because their injuries are indirect, their claims pose a risk of duplicative and multiple recoveries against defendants and the calculation of their damages would be extraordinarily complex.

Defendant Credit Lyonnais Rouse has adopted defendant Global's motion for summary judgment and added another reason why its motion for summary judgment should

be granted: plaintiffs have adduced no evidence that the activities in which Credit Lyonnais is alleged to have participated could have caused any of plaintiffs' alleged injuries or that this defendant had any intent to manipulate the United States physical copper market. Plaintiffs have alleged in their complaint only that Credit Lyonnais financed and cleared copper futures and options on the London Metal Exchange and the overseas over-the-counter market for Sumitomo and acted as one of nine clearing brokers for defendant Global. Defendant Credit Lyonnais is correct that, with the exception of an untimely expert affidavit that cannot be considered, *see* discussion below, plaintiffs have not made an adequate showing of this defendant's liability. Plaintiffs have adduced no evidence to show that allegedly illegal activity affecting the London Metal Exchange or the overseas over-the-counter market had any effect upon the market for physical copper in the United States or even that the disruption of the American physical copper market was a reasonably foreseeable consequence of the conspiratorial acts of which defendant Credit Lyonnais would have been aware. However, it is not necessary to address this claim in any detail because of my conclusion that plaintiffs lack standing to pursue their antitrust claims.

Plaintiffs' RICO claims fall with their antitrust claims because the remedies provision of the RICO statute, 18 U.S.C. § 1964(c), is modeled on section 4 of the Clayton Act and requires the same showing for standing. Plaintiffs' common law claim based on fraud on the market will be dismissed because the undisputed facts show that plaintiffs cannot make the requisite showing that the price of physical copper is tied directly to the price on the exchanges. The full price plaintiffs paid for copper included a premium that was

negotiated separately in a face-to-face transaction and that became an integral part of the final price.

I will exercise my discretion to dismiss plaintiffs' state law claims without prejudice once the federal claims are dismissed. A federal court is ill equipped to determine defendants' liability under state law, particularly when plaintiffs have alleged the violation of the antitrust and unfair trade practices laws of ten different states. (Originally, plaintiffs alleged that 17 states were involved; they have voluntarily withdrawn their claims as to seven of the states.)

Before discussing the motions for summary judgment it is necessary to address defendants' motions to strike. Both defendants moved to strike the affidavit of Paul Dewison and its accompanying exhibits and defendant Credit Lyonnais filed a separate motion to strike the affidavit of Reginald R. Smith of June 12, 2001, and attached documents. Plaintiffs submitted all of these materials for the first time with their reply to defendants' opposition to plaintiffs' motion for summary judgment. In opposition to the motion to strike, plaintiffs argue that the materials were nothing more than a response to arguments raised by defendants in their brief in response to plaintiffs' motion. In making this argument, plaintiffs ignore the fact that the subject of the expert materials is an issue that has been before the court from the beginning: the relationship of the London Metal Exchange to Comex and the physical copper market. Plaintiffs had no hope of holding defendant Credit Lyonnais liable for any damages or of establishing standing against this defendant unless they could make this link explicit. There is no basis for their argument that they needed an opportunity to respond to "new" arguments. Both motions to strike will be granted.

From the record and the proposed findings of fact proposed by the parties, I find that the following facts are relevant and undisputed.

## UNDISPUTED FACTS

### A. The Parties

Plaintiff Viacom, Inc., formerly known as Westinghouse Electric Corp., is a corporation incorporated in Delaware, with its principal place of business in New York, New York. Plaintiff Emerson Electric Co. is a corporation incorporated in Missouri, with its principal place of business in St. Louis, Missouri. Former defendant Sumitomo, Inc. is a corporation organized under the laws of Japan, with its principal places of business in Tokyo and Osaka, Japan. Former defendant Sumitomo Corporation of America is a corporation organized under the laws of New York, with its principal place of business in New York. (I will refer to both corporations as Sumitomo.) Defendant Global Minerals and Metals corporation is a corporation organized under the laws of Delaware, with its principal place of business in New York. Defendant Credit Lyonnais Rouse, Limited, is a corporation duly organized under the laws of England, with its principal place of business in London.

During the time relevant to this suit, plaintiff Viacom's predecessor, Westinghouse, owned a large copper wire rod and copper wire fabrication facility in Abingdon, Virginia. Between 1990 and 1995, Westinghouse purchased copper cathode for the Abingdon facility from producers such as Asarco, Cyprus Mines, Kennecott, Kidd Creek, Magma, Mitsubishi and Noranda. At the same time, plaintiff Emerson

was buying copper magnet wire from Phelps Dodge and Essex Group Incorporated. (Emerson is not relying on its copper purchases from Essex to support its claim to antitrust standing.)

B. The Commodities Futures Trading Commission

In an investigation of Sumitomo's trading, the Commodities Futures Trading Commission found that defendants Sumitomo and Global had manipulated the physical copper and copper futures markets in the United States. It concluded among other things that Global and Sumitomo had established and maintained large and dominating futures positions in copper on the London Metal Exchange with the intent of manipulating the price of copper and that in "October through December 1995, they acquired a dominant and controlling cash and futures market position, which directly and predictably caused copper prices, including prices on the United States cash and futures markets, to reach artificially high levels." June 30, 1995 Order of Commodity Futures Trading Commission, Smith Aff'd., dkt. #336, Exh. 2 at 2.

C. The Copper Market

During the period 1990-1996, the majority of copper cathode sold in the United States was produced using a three-stage process consisting of (1) mining and concentrating copper ore to produce copper concentrate; (2) smelting copper concentrate and copper scrap to produce copper blister or anode or both; and (3) refining copper blister, anode and scrap to produce copper cathode. (Copper cathode can also be produced through a process known as SX-EW, which does

not require smelting and refining.) At each stage of the traditional process, it is common for producers to buy and sell substantial quantities of copper products, including copper concentrate, copper scrap, blister, anode and copper cathode. They do this for a variety of reasons, including marketing considerations, geography, mismatches between a producer's manufacturing facilities and unforeseen events. Their sources may be unaffiliated third parties or partially owned affiliates. In the latter case, the purchases are frequently made on an arm's length basis.

Copper cathode is the only copper product traded on the London Metal Exchange or Comex Division of the New York Mercantile Exchange. Also, it was the primary copper product available for delivery against London Metal Exchange futures contracts during the relevant period, although copper wire rod could also be used.

Approximately 39% of the copper cathode that plaintiffs purchased and for which they are asserting antitrust damages claims in this action can be traced to copper cathode purchased previously by plaintiffs' suppliers from third parties. The original source of the remaining copper purchased by plaintiffs cannot be determined. It is impossible to determine whether the copper purchased by plaintiffs was purchased previously by their suppliers.

Between 1990 and 1995, Westinghouse resold approximately 75-80% of the copper cathode it purchased to merchants and other customers in the same form it purchased it, that is, through long-term contracts to purchase and resell cathode.

Brook Hunt & Associates, Ltd. is a consulting firm for the mining and metal industry. It tracks the movement of copper concentrate, anode and blister among mines, smelters and refineries on an annual basis and publishes the information.

D. Westinghouse's Abingdon Warehouse

Westinghouse operated a warehouse at its Abingdon wire facility. This warehouse had many of the attributes of a bank: producers made deposits of copper cathode and withdrawals of copper cathode. Westinghouse charged a small fee for the paper work associated with the transfers. The copper itself never moved from Abingdon. Thus, Kennecott could send a trainload of copper cathode to Abingdon, where it would be stored for eventual conversion to wire; Kennecott might transfer some of this copper to Asarco or Magma to pay off a copper "debt" it had incurred or it might obtain permission from Westinghouse to satisfy some of its supply obligation to the company with cathode from another supplier's account. Much of the cathode was sold and resold in the same form many times over. Many of the companies that bought the cathode hedged their purchases on the futures market. In addition, it was not unusual for a Westinghouse supplier to ship copper cathode to Westinghouse at Abingdon for credit to another producer's account.

Asarco shipped copper to Westinghouse's warehouse at Abingdon, Virginia, from Asarco's refinery in Amarillo, Texas. Along with other suppliers, merchants and customers, Asarco used the warehouse to store copper cathode it acquired from third parties that also used the warehouse for storage, as

reflected in toll reports that Westinghouse has produced. The reports do not provide any information regarding the terms of any transfers of copper, that is, whether the transfers occurred as a result of swaps, exchanges or purchases, but there is no economic distinction among swaps, exchanges or purchases. All of them are transactions in which each party surrenders something of value in return for something else.

Between 1990 to November 1995, Asarco acquired over 225,000,000 pounds of copper cathode from third parties at the Abingdon warehouse. On average, 30% of Asarco's total copper cathode sales to Westinghouse during this period were of copper cathode that Asarco had acquired from other companies that had stored copper cathode at Westinghouse. In 1994, the proportion was over 62%. Asarco acquired the copper through a purchase, exchange or swap.

E. Plaintiffs' Suppliers

1. Asarco

Between 1990 and 1996, Asarco was Westinghouse's biggest supplier, providing 706,885,000 pounds of copper, or 62% of the copper for which plaintiff Viacom is seeking damages in this case. Between 1993 and 1995, Asarco purchased at least 153,000,000 pounds of copper cathode from third parties for delivery to its Amarillo refinery. It is not possible to determine how much of this copper cathode was resold to Westinghouse. In addition, Asarco purchased another 155,000,000 pounds of copper cathode. It is not possible to determine whether this cathode was delivered to Amarillo or whether any of it was sold to Westinghouse.

Between 1990 and 1996, Asarco bought copper cathode from Gerald Metals, a merchant. In addition to its purchases of copper cathode, Asarco purchased pre-cathode copper, including copper concentrate, anode and scrap, from outside sources during the same period because its smelters had more capacity than its mines could fill and its refineries had more capacity than its smelters could fill. In some years, Asarco's anode purchases for its Amarillo refinery totaled 8,000 to 9,000 tons a month. There is no way to determine whether third-party pre-cathode products were used to manufacture the cathode that Asarco sold to Westinghouse.

Asarco acquired copper blister or anode or both from as many as twelve different smelters as well as from copper traders. Of the twelve smelters, two were wholly-owned; three were partially owned and the rest were unaffiliated. Also, Asarco acquired copper concentrate from as many as 50 mines around the world, three of which it owned, 13 of which it partially owned and the rest of which were unaffiliated. Data from Brook Hunt show that between 1990-1995, the feed for Asarco's wholly owned smelters that fed the Amarillo facility came from these sources: (1) wholly owned mines (49.0% - 72.7%); (2) partially owned mines (4.7% - 13.4%); (3) mines unaffiliated with Asarco (0.5% - 24.6%); and (4) merchants (13.4% - 22.2%). The same data show that the feed for Asarco's partially owned smelters that fed the Amarillo refinery came from the following sources: (1) wholly owned mines (0%); (2) partially owned mines (77.9% - 91.4%); (3) unaffiliated mines (3.4% - 15.1%); and (4) merchants (1.6% - 7.0%).

As much as 41% of the copper refined at Asarco's refineries was purchased from unaffiliated suppliers. Asarco

used third-party pre-cathode copper to manufacture copper cathode for sale to customers such as plaintiffs. It is not possible to determine whether third- party pre-cathode copper was resold to plaintiffs in the form of copper cathode and if so, how much. Asarco's purchases of copper, including copper cathode and pre-cathode copper, were made at prices indexed to LME or Comex prices.

(Plaintiffs assert that defendants have misrepresented the amount of pre-cathode copper that Asarco bought. They cite Asarco's 10-K filings in which the company said it was self-sufficient in the supply of copper concentrate for its smelting operation and the lack of any data in the Brook Hunt reports indicating shipments from Chemetko to Asarco's Amarillo facility. Asarco's 10-K's do say that the company was self-sufficient in some years but the same 10-K's show that the company's refining output exceeded its smelting output routinely and that its smelting output exceeded its mining output in all but one year. The Brook Hunt data show the shipments from Chemetko under the name Alton.)

2. Kennecott Utah Copper Corporation

Kennecott was Westinghouse's second largest supplier. It is located in Utah and supplied approximately 12% of the copper Westinghouse bought between 1990 and 1996. According to Westinghouse's reports, Kennecott purchased over 200,000,000 pounds of copper cathodes from other companies that maintained tolling accounts at Westinghouse's Abingdon warehouse from 1990 to 1995. (Copper is "tolled" when it is delivered to a facility for conversion into another form rather than sold outright; the copper at Abingdon was stored there for conversion into copper wire.) Kennecott

received only 67,000,000 pounds of copper cathode in its tolling account through railroad or truck shipments; the majority of copper cathode in its tolling account was acquired from third-parties. The remaining copper that Kennecott needed to meet its supply contract with Westinghouse was resold to the company from Kennecott's account. The cathode that Kennecott sold to Westinghouse could change hands several times before it arrived at Abingdon.

Kennecott purchased pre-cathode copper in the form of anode and scrap from Magma when its own smelter was inoperable during parts of 1994 and 1995. It paid for the copper at prices based in part on the London Metal Exchange or Comex exchange. It is not possible to determine with precision how much pre-cathode copper Kennecott purchased from Magma.

3. Magma

Magma sold 9,100,000 pounds of copper cathode to Westinghouse in 1994, or 0.6% of the copper at issue in this case. In 1994, Magma purchased at least 2,000,000 pounds of copper for delivery to Abingdon from Gerald Metals. In addition, Magma frequently purchased substantial amounts of copper cathode from many different sources, including producers, merchants and copper consumers. Between 1990 and 1996, Magma acquired copper concentrate from 23 mines, as well as from merchants. Of the 28 mines, five were wholly owned, two were partially owned and the remainder were unaffiliated. From 1990 to 1996, Magma purchased pre-cathode copper to fill its smelters from at least 24 different suppliers, including merchants and producers such as Asarco, Kennecott and Cyprus. Magma obtained

between 37% and 40% of the copper for its refineries from third parties. Also, Magma sold copper concentrate to third parties, including Metallgesellschaft, and sold anode to suppliers, including Asarco, Cyprus, Kennecott, Phelps Dodge and Noranda. Magma's purchases of copper, including copper cathode and pre-cathode copper, were at prices indexed to LME and Comex prices.

4. Phelps Dodge

Phelps Dodge was plaintiff Emerson's largest supplier, providing all of the copper for which plaintiff Emerson claims damages, or about 232,000,000 pounds, from 1990 to 1996. Phelps Dodge sold copper magnet wire to Emerson under an agreement that committed Emerson to purchases of specified quantities of copper cathode from Phelps Dodge at a Comex-based price. Phelps Dodge Magnet Wire, a subsidiary of Phelps Dodge, would then fabricate the cathode into copper magnet wire for a separate fabrication fee.

The wire that Phelps Dodge sold to Emerson was made principally from copper rod manufactured at Phelps Dodge's rod mill in El Paso, Texas. Some of the wire that Phelps Dodge Magnet Wire manufactured for Emerson was made from copper rod acquired from outside sources. Phelps Dodge purchased over 65,000,000 pounds of copper cathode for its El Paso rod mill between 1990 and 1995.

Phelps Dodge owns a refinery in El Paso, Texas, that obtained pre-cathode copper from 13 smelters, one of which was wholly owned, three of which were partially owned and the remainder of which were unaffiliated. Phelps Dodge purchased over 192,000,000 pounds of blister and almost

37,000,000 pounds of scrap for the refinery between 1992 and 1996. Phelps Dodge's smelters processed copper concentrate from 25 mines, only three of which were wholly owned and six of which were partially owned. In 1993, for example, Phelps Dodge purchased 119,350,689 pounds of concentrate. Phelps Dodge's purchases of copper, including copper cathode and pre-cathode copper, were at prices indexed to LME and Comex prices.

5. Mitsubishi International Corporation

Mitsubishi was Westinghouse's fourth largest supplier. (Plaintiffs are not making any federal antitrust claim for damages resulting from purchases made from this supplier.) Mitsubishi owned a joint interest in a copper production facility until 1991. All of the copper cathode that Mitsubishi sold to Westinghouse was purchased by Mitsubishi from a third-party at a price derived from a Comex price plus a negotiated premium.

6. Cyprus

Cyprus sold 42,666,544 pounds of copper cathode to Westinghouse in 1990 and 1991. Cyprus bought copper cathode from Kennecott during the period 1990 to 1996 and purchased pre-cathode copper from at least one third-party source from 1990 to 1996. (It purchased copper anodes and copper concentrate from Magma.). Cyprus purchased 22,000,000 pounds of copper cathode from other suppliers with accounts at Westinghouse's warehouse at Abingdon, which is 40% of the cathode Cyprus received in its toll account at Westinghouse. The toll reports confirm direct

railcar shipments of 42,666,544 pounds of cathode to Westinghouse.

7. Noranda and Kidd Creek

Considered together, Noranda and Kidd Creek, which Noranda acquired in 1994, were Westinghouse's third largest supplier. Toll reports from the Abingdon warehouse show that from 1993 to 1995, over 80% of the copper cathode received into Noranda's toll account was purchased by Noranda from a third-party storing copper cathode at the warehouse. Noranda sold copper cathode to Westinghouse for delivery at locations other than Abingdon, such as the Phelps Dodge rod mill in Norwich, Connecticut. It is not possible to tell whether the copper cathode delivered by Noranda to non-Abingdon locations for Westinghouse was purchased by Noranda from outside sources. Noranda purchased pre-cathode copper from more than 50 mines. It purchased anode from Magma and scrap from Essex for conversion into cathode.

In at least one of its contracts with Westinghouse, the parties agreed that Noranda would provide "Kidd Creek FKA Brand Full-Plate Electrolytic Copper Cathodes" or "other equivalent brands if agreed between Buyer and Seller."

F. Hedging

It is routine for participants in the copper market to hedge their physical copper purchases and sales as a means of protecting themselves against the risk of price movements in the physical copper market. They do so by trading futures and options contracts on the London Metal Exchange, Comex

or over-the-counter. A futures contract is a form of security traded on an exchange that obligates the holder to buy or sell a fixed quantity of a commodity at a fixed price at a specific future date. The advantage of such a contract is that it gives the holder the ability to sell or buy back the commodity before making delivery by entering a second, equal and opposite contract and paying or receiving the difference between the price of the first and second contracts. Put options protect against downside loss on a stock or commodity; as the price falls, the holder of the put has the choice of either selling the put and keeping the stock or exercising the put and selling the stock at the strike price set in the put. David L. Scott, *Wall Street Words* 299-300 (1988). Option purchasers pay a premium that compensates the counterparty for assuming a one-sided risk. The premium equals the value of the option and fluctuates as underlying prices changes. If prices fall, the put option increases in value, as the likelihood increases that the option will be exercised.

Phelps Dodge, Asarco, Noranda, Magma and Cyprus all used strategic hedges with their annual copper production to varying degrees; Phelps Dodge employed transactional hedges with 100% of the copper it sold to plaintiff Emerson on a forward basis, that is, it would buy futures contracts in an amount equivalent to the amount of physical copper it had agreed to deliver to Emerson in the future. At delivery time, it would sell the contracts back at the average price. Phelps Dodge's goal was to achieve the Comex average. The net of the price that it received from Emerson and the net of the realization from the futures transaction would yield the Comex average price. Phelps Dodge also hedged by selling put options.

Magma and Asarco hedged by selling both futures contracts and options. Westinghouse's merchant customers hedged their purchases of copper cathode from Westinghouse. Westinghouse did not use futures contracts or put options to protect itself. Instead, it priced its long term purchase contracts for copper cathode on the basis of the monthly average Comex settlement price in the month of delivery and then resold most of the copper cathode delivered to it at a similar price.

All hedging involves the taking of equal but offsetting positions to protect against the risk of price movements.

G. Other Litigation

Four of plaintiffs' suppliers submitted claims totaling approximately $2.7 billion for their purchases of copper cathode and rod and $1 billion for their purchases of raw materials in the California litigation against defendants Sumitomo and Global. Asarco's claim against the settlement fund was based on purchases of over 500,000,000 pounds of copper cathode made between January 1, 1993 and June 1996. This figure included approximately 120,000,000 pounds of copper that Asarco sold to Westinghouse from 1993 to 1995. Kennecott asserted a claim against the settlement fund based on its copper cathode purchases of $96,500,000 as well as a $69,500,000 purchase of copper anode from Magma. Magma submitted claims to the California court based on purchases of copper anode, blister, scrap and other pre-cathode copper products totaling $1,160,000,000. Essex submitted claims to the California claims administrator totaling $1,800,000,000.

Traders on Comex submitted claims against a settlement fund of more than $100,000,000 established by Sumitomo and defendants to settle a class action brought by Comex traders to collect damages for the alleged manipulation of the copper futures market by defendants during the same period at issue in this case. Metalgesellschaft traded on the LME; it asserted a claim against defendants based on allegations similar to those asserted in this case. Its case was dismissed for lack of subject matter jurisdiction. It has not said whether it will file a new claim in England.

H. Pricing

In general, there are two distinct components to physical copper pricing, whether the product is copper cathode or pre-cathode copper: one component is the price for copper futures contracts traded on the London Metal Exchange or Comex; the second is a premium or discount that varies depending on supply and demand, shipping costs, the business cycle, payment terms, the contracting party's desire for a profit and other considerations. If a purchaser is buying cathode that it wants converted to rod, it pays an additional rod premium that varies depending on supply and demand, costs, the fabricator's prior history with the customer, its desire to retain the customer and the particular specifications for the finished rod.

No single Comex price is quoted and used by all participants in the physical market at any one time. Instead, there are 24 different Comex prices, one each for delivery in the present month and in each month up to two years in the future. Physical copper buyers may use any one of these prices or a combination of them as an element of the price

they pay for copper. Between 1990 and 1996, buyers and sellers of copper cathode might have used the Comex month average price for the month of delivery, the Comex price at a particular time during the month of delivery, firm pricing, forward fixed pricing and the previous day's Comex closing price, among other prices.

Plaintiffs did not use the same pricing method, although their purchases of copper cathode were indexed to the Comex price. Westinghouse priced its purchases on the basis of either the monthly average Comex settlement price in the month of delivery, the Comex spot price at the time of purchase or a fixed price based on the prevailing futures market price at the time of delivery. (A "spot price" or cash price refers to the price for a transaction in which the commodity is to be delivered immediately or nearly so. Scott, *supra* at 57-58). Plaintiff Emerson purchased 90% of its copper by setting the price with its supplier in advance of delivery by reference to the then prevailing futures price for a contract due in the month of delivery. In other words, Emerson knew when it bought copper cathode what it would be paying for it when it took delivery in the future.

Westinghouse made the majority of its purchases on the basis of the average Comex first position settlement price in the month of delivery, that is, the average price for immediate delivery in that month. It matched its annual and spot purchase contracts with its suppliers to particular resale contracts the company had negotiated previously or that it expected to negotiate. It negotiated the pricing terms for both contracts to insure that it would earn a profit on the transactions and insulate itself from the effect of copper price fluctuations on the Comex market. For example, it would

negotiate a contract for the purchase of copper cathode at a price equal to the "arithmetic average of [Comex] first position settlements for high grade copper during the calendar month of scheduled shipment plus a monthly premium based on product and destination," Trenchard Affid. III, dkt. #360, Exh. 51, often discounting the premium for cash in advance or for location or both. Then it would negotiate a resale contract with a premium discount to the buyer that was less than the premium discount it had made to the seller. Throughout the period in question, Westinghouse made substantial profits on its copper cathode trading operations.

In at least one of Westinghouse's supply contracts with Asarco, *see* Trenchard Affid. I, dkt. #358, Exh. 9, the parties agreed that if either believed that the Comex quotations for copper were not "properly representative of relevant market conditions then the parties [could] negotiate with a view to reaching a mutually agreeable alternative pricing basis as to all future shipments under this contract." In at least one contract with Noranda, the parties agreed that Westinghouse would have the right to elect different pricing options (averaging or spot) during the term of the agreement provided that it gave notice to Noranda before a quotational period for the Comex price chosen.

Plaintiff Emerson's pricing strategy was to "forward price" up to two years in advance of delivery as a tool for controlling the price it paid for the copper wire it purchased. In deciding the forward prices they wanted to lock in, Emerson and its divisions took into account general market information, copper prices, the present and anticipated demand for copper and projected copper prices. In practice, each of Emerson's divisions would notify the person

responsible for buying copper cathode of the amount it wanted to purchase and the price it wanted. The buyer would then place an order with Phelps Dodge for a certain amount of copper cathode at the desired price; when the Comex prices for delivery in a relevant future month dropped within the range of acceptable prices, the price would be fixed and the copper would be delivered at that price. In a number of instances, the purchase orders expired unexecuted because the price never fell low enough.

Because plaintiffs used a variety of pricing mechanisms, the impact of any manipulation of the futures market upon the prices plaintiffs paid would vary widely. For example, forward pricing such as plaintiff Emerson's would tend to insulate Emerson from the effects of any "squeeze" in the market, that is, any long manipulations of the market in which the manipulator buys copper futures contracts in excess of the copper supply that can be delivered immediately, accepts the delivery that is made and exacts an artificially high price from persons who have sold the commodity short. Such manipulations have a greater effect upon spot prices than upon forward prices. ("Backwardation" or "inverted market" refers to the market condition in which "spot" or nearby prices are higher than forward prices. This is the opposite of the typical condition in which future prices are higher than spot prices (a condition known as "contango"). Scott, *supra* at 199.)

As a matter of economics, an alleged manipulation of the copper futures market would not be expected to have a direct, predictable, uniform or sustained effect on the price of physical copper in either the short or the long term. The existence of indexing would not have caused plaintiffs to pay

artificially inflated prices for the bulk of the copper cathode they purchased over the long term, with the exception of those contracts that were negotiated before the defendants' alleged manipulation took effect and after the buyers had lost their ability to negotiate adjustments in the premium. This is because physical copper prices are influenced by fundamental supply and demand forces. When the price rises beyond what buyers are willing to pay, economic pressures force prices back to competitive levels as buyers seek out substitute products and sellers accumulate excess inventory.

## I. Records

Neither Westinghouse nor many of the third parties, including Asarco, Magma and Phelps Dodge, could locate documents relating to the source of the copper that plaintiffs purchased. This is not only because many of their documents have been lost or destroyed but because the companies do not create such records pursuant to their usual business practices.

The nature of the refining process makes it impossible to determine whether the copper cathode purchased by plaintiffs was cathode processed from pre-cathode copper the suppliers had purchased for resale or from the pre-cathode copper extracted from the suppliers' own mines. It is impossible to determine the source of copper cathode used to manufacture the wire that was delivered to plaintiff Emerson by its suppliers.

Plaintiffs and their suppliers have not produced records sufficient to determine the Comex prices for all of the purchases claimed in this action. The Comex prices during the years at issue are a historical fact. However, the total

prices that plaintiffs paid for copper cannot be determined unless plaintiffs can produce records relating to their copper purchases. Plaintiffs have given no indication that they can do so and have acknowledged that they no longer have examples of contracts with Magma and Cyprus.

## OPINION

### I. ANTITRUST CLAIMS

#### A. Antitrust Standing

Plaintiff Viacom is asserting antitrust claims on behalf of Westinghouse Electric Co., a predecessor to Viacom, for Westinghouse's purchases of approximately 1,150,000,000 pounds of copper cathode from suppliers, including Asarco, Cyprus Mines, Kennecott, Kidd Creek, Magma, Mitsubishi and Noranda, which it made from 1990 until November 1995, when it closed its Abingdon, Virginia facility. Plaintiff Emerson Electric Co. is asserting an antitrust claim for approximately 232,300,000 pounds of copper magnet wire it purchased from Phelps Dodge, from January 1990 through June 1998. Plaintiffs describe their suppliers as integrated copper producing companies, meaning that they owned mines, smelters and refineries.

Plaintiffs do not contend that they made any purchases from any of the defendants or that they traded copper futures contracts on either the Comex or LME. Thus, they have an uphill battle to wage if they are to prevail on their standing claim. Under the Supreme Court's decision in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), standing to sue for damages for alleged price fixing is "limited to individuals

who purchase supra competitively priced products directly from a violating party." *Rozema v. Marshfield Clinic*, 977 F. Supp. 1362, 1375 (W.D. Wis. 1997). Plaintiffs argue that their claim to standing is based on an equally direct antitrust injury caused by defendants' illegal actions intended to affect the market in which plaintiffs traded. They maintain that such a claim was given recognition in *Sanner v. Board of Trade*, 62 F.3d 918 (7th Cir. 1995). In that case, the plaintiffs were soybean farmers who claimed that they had suffered antitrust damages as a result of the defendants' conspiracy to cause a sudden drop in soybean cash crop prices and to maintain those prices at artificially depressed levels. The district court had granted the defendants' motion to dismiss the complaint for lack of standing. The court of appeals held that when the plaintiffs' allegations were viewed in the light most favorable to plaintiffs, they made out a claim of antitrust standing and withstood defendants' assertions that the causal chain linking the futures and cash markets was too attenuated to permit the court to attribute any decline in the cash value of the soybeans to the manipulation of the futures market. The court found the plaintiff farmers' allegations sufficient to suggest that the two markets were so closely related that the distinction between them was of no consequence to the standing analysis. *Id.* at 929.

Plaintiffs contend that the artificially high prices they had to pay for physical copper were directly and explicitly tied to Comex and LME prices in the same way as the soybean cash and futures prices in *Sanner* and that they had no option but to pay those prices. Their allegations are sufficient to require additional inquiry to determine whether plaintiffs can meet the tests for antitrust standing. Antitrust standing is distinct from standing under Article III of the

Constitution. In both instances, plaintiffs must show an injury in fact, but in antitrust actions, plaintiffs must make the additional showing that they are the proper parties to bring a private antitrust action. *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 535 n.31 (1983). Plaintiffs must show both that there is a connection between the alleged wrongdoing of the defendants and their own injury and that the injury is attributable to the "anti-competitive aspect of the conduct under scrutiny." *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990). Only those who are in the best position to vindicate the alleged violation have standing to sue. *Blue Cross & Blue Shield v. Marshfield Clinic*, 881 F. Supp. 1309, 1315 (W.D. Wis. 1994). In summary, a plaintiff must prove an injury in fact, that is, that defendants' actions have caused injury to plaintiff's business or property; the injury is not too remote or duplicative of the recovery of more directly injured persons; the injury is one that the antitrust laws were intended to prevent and flows from the defendants' illegal conduct; and the damages claimed measure the injury in a reasonably quantifiable way. *In re Copper Antitrust Litigation (Loeb Industries, Inc. v. Sumitomo Corporation)*, 196 F.R.D. 348, 355 (W.D. Wis. 2000) (citing II Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 360 (rev. ed. 1995); *Associated General Contractors*, 459 U.S. at 537-45).

The burden is on plaintiffs to show that they have standing. II Areeda & Hovenkamp, *supra* at ¶ 360. They cannot simply argue that defendants have failed to show that they lack such standing. At this stage of the litigation, plaintiffs must demonstrate that they have definite and

particularized proof to support their claim of antitrust standing.

B. Requirements of Antitrust Standing

1. Injury in fact

The first element of standing plaintiffs must prove is that they suffered an injury in fact as a result of defendants' actions. The complaint states a causal connection between an antitrust violation and harm to plaintiffs and it alleges that defendants intended to cause that harm. In the order denying defendants' motion to dismiss in this case, I found that plaintiffs' allegations were sufficient in this respect. Plaintiffs had alleged that the London Metal Exchange and Comex constitute one copper exchange market; prices of copper exchange contracts dictate the price for the purchase and sale of physical copper; and the cash price for physical copper is directly related to and dictated by copper exchange contract prices. This was enough to show that the injuries plaintiffs had suffered were of the type that Congress sought to redress or prevent through the antitrust laws and that there was a direct, causal connection between defendants' market restraint and plaintiffs' injuries.

The undisputed facts bear out plaintiffs' allegations that there is a causal connection between manipulation of the futures market and higher prices in the physical market. Whether that connection is direct enough to give plaintiffs antitrust standing is another question. *See Associated General Contractors*, 459 U.S. at 537: "[T]he mere fact that the claim is literally encompassed by the Clayton Act does not end the inquiry."

2. Remoteness of injury and duplication of recovery

a. Remoteness of injury

The second standing element requires a closer focus on the directness of the injury. Now that the record has been fleshed out with discovery, it is clear that the relationship between manipulations of the futures market and particular transactions in the physical copper market is neither direct nor predictable but subtle and complex. It is undisputed that the futures market affects the cash market, as the Commodity Futures Trading Commission found; what that effect might be on any particular transaction is a subject of considerable dispute. Because there is a wide range of pricing options and pricing strategies available to buyers of physical copper, any manipulation of the futures market will have different effects upon transactions, even those negotiated in the same month. For example, a manipulation in the form of a squeeze that raises the price of spot transactions will have a lesser effect, if any at all, on a forward contract tied to a price 24 months in the future.

The number of exchange-based pricing formulas, the variety of pricing strategies that buyers use, the laws of supply and demand and the premiums and discounts that reflect supply and demand make it enormously difficult to track the particular influence of the futures market on any one physical copper purchase. The individual decisions that go into physical copper purchases are intervening factors that refute plaintiffs' assertion of a direct, causal connection between a manipulation of the futures market and an effect on a particular transaction.

In opposition to the extensive evidence that defendants produced to show the complexities of the alleged link between the two markets, plaintiffs have produce no evidence to the contrary, except the CFTC finding. Instead, they simply reiterate their argument that their claims are based solely on the "surcharge" they had to pay on the exchange-based portion of the price for copper cathode as a result of defendants' manipulations. They assert that these surcharges mirror the manipulations in the futures market and can be determined easily simply by comparing the historical price set by the exchanges and comparing it to what it would have been without a manipulation.

Plaintiffs' assertions about the surcharge and the manner in which it could be computed are not borne out by the undisputed facts or by anything that plaintiffs have submitted in the way of proof. At this stage of the proceedings, after seven months of discovery devoted to standing, more is required of plaintiffs than mere assertions about the ease in which a court could determine the link between defendants' actions and plaintiffs' alleged antitrust injuries. Plaintiffs should be able to explain the way in which this could be done in detail and with examples.

Plaintiffs have avoided discussing the complexities of the relationship between the indexed component of the price for physical copper and the premium by disavowing any interest in making claims for damages based upon the increases in premiums. Rather, they argue, they are simply looking to recoup the penny for penny increase in the indexed component that they allege was caused by the manipulation. In saying this, plaintiffs have not only ignored the complexity of the link but have downplayed the inseparability of the

premium from the total price. They have tried to portray the price of physical copper as easily divisible into its two components. As I understand it, their position is that if the indexed price for a certain month was $.95 and the records show that plaintiffs bought copper in that month for $1.00, the premium could only be $05. This approach ignores the undisputed fact that buyers and sellers of physical copper negotiated the premiums to take into consideration such matters as supply and demand and that the total price might well represent a discount on the indexed price. Unless one knows the exact amount of the premium paid and what it represented, one cannot know whether the exchange-based price was discounted for one reason or another. Physical copper prices respond to forces of supply and demand and will deviate from futures prices if the futures prices do not accurately reflect those factors. The negotiation of the premium allowed traders to account for these factors and for others as well.

Taking account of the factors intervening between the manipulation of the futures market and the prices plaintiffs paid for physical copper, including the skillfulness of the people who bought copper cathode for plaintiffs, and the unrebutted evidence that the futures market does not move in lockstep with the physical copper market, I conclude that plaintiffs' injuries are too remote from defendants' alleged wrongdoing to give plaintiffs standing to sue for redress. This conclusion does not mean that defendants will escape sanctions for their alleged manipulation. They have been fined by the CFTC, sued by indirect purchasers in the state courts in California and sued by the most direct victims of their conspiracy, the copper futures market traders, in federal court in New York.

Although the conclusion that plaintiffs' injuries are too remote to give them antitrust standing could dispose of this part of the case, I will address the remaining *Associated General Contractors* requirements.

b. Potential duplication of recovery

1) "first purchaser theory"

The second prong of the second inquiry relates to the potential duplication of recovery. Plaintiffs contend that their claim avoids the potential for duplicate recoveries that doomed the plaintiffs in *Loeb Industries, Inc.*, 196 F.R.D. 348. In *Loeb*, the plaintiffs were dealers in scrap copper, who alleged that they had been injured each time they bought copper at prices indexed to a market that defendants had manipulated. The plaintiffs were denied standing because they were buying and selling copper that had been bought and sold previously, posing the risk that defendants would be liable for dozens of transactions involving the same copper and involving a new pass-on charge with each transaction. In this case, by contrast, plaintiffs argue that they are the "first purchasers" with respect to their purchases from integrated producers that mined, smelted and refined the copper they sold to plaintiffs. As "first purchasers," they argue, they can sue for damages without concern that the copper cathode they were buying had been bought and sold before or produced from raw copper products that had been bought and sold, that is, without concern that antitrust damages had been passed along from one purchaser to another. Their injuries would be direct and not prohibited under *Illinois Brick* as potentially duplicative of the injuries of other purchasers.

In their motion for partial summary judgment, plaintiffs focus on specific purchases of copper cathode Westinghouse made from Asarco and from Kennecott, and on plaintiff Emerson's purchase of copper cathode delivered in the form of copper magnet wire from Phelps Dodge Magnet Wire Company. Plaintiffs believe that these purchases were "first purchases" and that neither the cathode nor its raw materials had been the subject of any previous sale or purchase. They allege that the Asarco and Kennecott copper delivered to Westinghouse was purchased under a contract requiring these companies to supply their own brand of cathode and that the unit price (cost per pound) was to be determined by the average Comex contract settlement prices for the month of shipment plus a separate and distinct premium. They allege that over 95% of the copper cathode used to make the magnet wire delivered to plaintiff Emerson was derived from Phelps Dodge's own mines and that it was purchased at a Comex-based price plus a separate and distinct premium.

In the order denying defendants' motion to dismiss this case, I assumed for the purpose of that decision that plaintiffs had bought copper cathode directly from the copper extractor so that their claims would not duplicate those of other purchasers of copper. Again, discovery has changed my original view of plaintiffs' claims. It has become apparent that plaintiffs' allegations painted a picture of the copper industry that does not reflect reality. As the undisputed facts establish, showing that purchases of copper cathode were made directly from an integrated copper producer does not prove that the cathode has never been bought or sold before, whether as cathode or as pre-cathode (concentrate, anode, blister or even scrap). Three factors in particular make it

unlikely that any purchaser could insure that it is the "first purchaser" of the product it buys. First, even integrated purchasers like Kennecott, Asarco and Phelps Dodge acquire raw materials and copper cathode from many sources. Even when the acquisitions are from subsidiaries, they are generally arm's length transactions charged off on the books at market prices. Thus, there is a potential problem of passing on and duplication of recovery. Second, once copper is refined, it is impossible to know its provenance. No one can say whether any particular copper cathode was once Asarco's ore or someone else's scrap. All that can be said is that it was of a certain quality or purity. Third, even copper cathode that is "branded" after refining is treated as fungible. This is demonstrated by the transactions that Westinghouse recorded in its warehouse, where it was the usual process for producers to transfer copper among themselves to fulfill supply contracts with Westinghouse. Producer A could fulfill its supply contract with Westinghouse with copper that had been credited to producer B's account, often after the copper had gone through several previous account transfers.

Plaintiffs argue that none of these factors presents an impediment to its suit. They maintain that the only physical copper market that defendants targeted and that is at issue in this case is the market for copper cathode, so that it is irrelevant whether plaintiffs' suppliers bought concentrate or anode or blister to supplement their own supplies. They add that because defendants did not target pre-cathode copper, the pricing of this commodity was not affected directly, as was the pricing for copper cathode. Moreover, they argue, defendants traded exclusively in copper cathode during the relevant time period, not pre-cathode copper; pre-cathode copper is not traded on the exchanges defendants manipulated

or contained in the warehouses defendants cornered; the pre-cathode copper their suppliers obtained is minuscule in comparison to the amount they produced themselves; and those producers who did acquire small amounts of pre-cathode copper experienced enormous windfall profits on their sales of the copper cathode that was targeted.

Plaintiffs' attitude toward the targeting of pre-cathode copper is a switch from the position they took in their original complaint, in which they alleged that they had sustained damages for the purchase of such pre-cathode copper because the prices for those products was dictated by the prices of futures contract on the copper futures market. Plaintiffs cannot avoid the force of that admission. The undisputed fact is that pre-cathode copper is priced with reference to the futures market, just as copper cathode is. Even if defendants were targeting only the market for copper cathode and even if the warehouses contained only cathode, as plaintiffs allege, defendants' actions would have affected the prices of pre-cathode copper. Therefore, if the copper cathode that plaintiffs purchased included pre-cathode copper products that the supplier had purchased, one consequence is that both plaintiffs and their suppliers would be in a position to claim damages resulting from defendants' manipulation of the futures market. Defendants would be subjected to the risk of unwarranted multiple liability.

Plaintiffs suggest in their brief that the suppliers could not have passed on any increases in the prices they had to pay for pre-cathode copper because they were "price takers" that could charge only the market price for copper cathode as set by the manipulated exchanges. This argument makes little sense. If the suppliers paid an artificially high price tied to

Comex for their pre-cathode copper and sold the refined copper to plaintiffs at an artificially high price tied to Comex, the suppliers passed on an artificially high price, whether or not they were "price takers." Both the supplier and plaintiffs could claim a resulting injury. If plaintiffs are suggesting that, as "price takers," their suppliers were not in a position to pass on any artificially high price but rather had to absorb the high prices they had paid previously, plaintiffs must be saying that the suppliers were often forced to sell at a loss. If this is their argument, they have not explained why the suppliers would be willing to do so. Even if there were some surface plausibility to this suggestion, it does not square with plaintiffs' charge that their suppliers realized windfall profits during the period at issue. As to the "minuscule" nature of the amounts of pre-cathode copper purchased by plaintiffs' suppliers, at least four of them have filed claims totaling several billion dollars in the California state court litigation based on their purchases of pre-cathode copper.

Arguing that the myriad transactions involving copper cathode sales at the Abingdon warehouse are not fatal to their "first purchaser" claim, plaintiffs argue that the possibility that some of their purchases may not have been "first purchases" goes only to the question of damages. So long as some of their purchases were first ones, they maintain, they have standing to bring this action. The difficulty with this argument is that plaintiffs have not shown that they can prove that they were first purchasers as to any of the copper at issue. To the contrary, the undisputed facts indicate that plaintiffs cannot identify any copper cathode transaction and say with confidence that the copper had not been bought and sold previously. I will acknowledge, however, that it is possible that plaintiffs could show that a certain percentage of

their copper purchases from certain suppliers were first purchases even if they cannot identify particular transactions. This does not end the inquiry, however, because it is undisputed that plaintiffs' suppliers and customers engaged in hedging their sales and purchases and that this hedging could give rise to duplicate claims for the same transactions on which plaintiffs rely for their claims.

2) hedging

The importance of hedging to the question of potential multiple liability is the fact that, by its nature, hedging adds to the number of transactions involved in every sale of copper. The buyer hedges its purchase of copper before it takes delivery and pays the supplier; the supplier hedges its production before it makes delivery and receives its payment. Each transaction (the seller's hedge, the purchase and the buyer's hedge), gives rise to a potential claim against defendants under plaintiffs' theory that all purchases are tied directly to the futures markets. Thus, Asarco would hedge its production or its particular contract with Westinghouse; Westinghouse would enter into a matching transaction at the same time it agreed to buy from Asarco; and Westinghouse's customer would hedge its agreement to buy the same copper from Westinghouse. Some or all of those transactions might give rise to potential claims if the indexed price at the time of the transactions was artificially high.

Rather than deny the integral nature of hedging to the copper market, plaintiffs take the position that none of the hedging is relevant to the question of duplicate recovery, for four reasons. First, most of the hedging strategies engaged in by their suppliers involved put options. Second, defendants

have no real support for their position that the claims of the futures market participants are more direct than plaintiffs' claims other than the testimony of their expert economists, both of whom rely on an illusory perfect hedge and the distinctness of the two markets. Third, defendants have no legal authority that supports their position that the possibility of claims for hedging losses precludes claims for losses on the physical copper market and a similar argument was rejected in *Sanner v. Board of Trade*, 62 F.3d 918 (7th Cir. 1995). Fourth, suppliers are not likely to file claims in the futures litigation because they all made net profits in their hedging during the years in question. None of these arguments has merit.

a) put options and strategic hedging

Plaintiffs are correct that put options differ from futures contracts and that the evidence shows that some of the suppliers relied on hedging their entire copper production rather than specific transactions. However, these differences do not affect the analysis. The premiums of put options rise and fall with the market; if plaintiffs' suppliers paid artificially high prices for their put options, they have as good a claim against defendants for the market manipulation as plaintiffs do. Strategic hedges present the same specter of overlapping claims for recovery as do transaction specific hedges because some proportion of the copper production sold to plaintiffs is covered by the production hedge. Even if I were to accept plaintiffs' argument and focus solely on the transaction-specific hedges that involved futures contracts, I would face inordinate difficulties in determining which if any of the transactions at issue pose no risk of duplicating another potential claim.

b. economic evidence

Plaintiffs attack the value of defendants' expert testimony by saying that the experts rely on illusory perfect hedges. This is a mischaracterization of the experts' affidavits. Kenneth R. Cone, one of defendants' experts, has explained that he does not rely on "perfect hedges." Rather, he explains at length why any kind of hedge will give rise to the potential of duplicative recovery. In any event, plaintiffs' challenge is misguided. It does not require expert economic theory to understand that under plaintiffs' theory, both the seller of a commodity who hedges the sale by buying a futures contract at an artificially high price and the buyer who pays an artificially high price have potential claims against the manipulator of the market because they are using the same futures market price as their price index. These claims would duplicate each other because they arise out of the same copper transaction. In this situation, the manipulator would be subject to multiple claims for the same conduct. It makes no difference whether the potential claimants will actually pursue their claims; the concern is with the possibility. It was this concern that led the Supreme Court to hold in *Illinois Brick v. Illinois*, 431 U.S. 720 (1977), that only direct purchasers of a supra competitively-priced product could sue for antitrust damages. Two policy concerns animated the Court's decision: the transformation of "treble-damages actions into massive multiparty litigations involving many levels of distribution and including large classes of ultimate consumers remote from the defendant," *id.* at 745, and the enormity of the task that courts would face in attempting to determine damages incurred at each level of distribution. II Areeda & Hovenkamp, *supra* ¶ 346c ("The point to be drawn from Illinois Brick and its predecessor, *Hanover Shoe*, is the

practical one that the effectiveness of the antitrust remedy would be undercut if the task of tracing antitrust injuries and determining damages becomes overly complex.").

c) hedging in *Sanner*

Plaintiffs argue that in *Sanner*, 62 F.3d 918, the court of appeals rejected the idea that the possibility of duplicate claims for hedging losses would prevent the plaintiff farmers from bringing an antitrust claim. Their argument is disingenuous. *Sanner* said nothing about the possibility of duplicative recoveries resulting from hedging in connection with the plaintiffs' claim to standing. If the defendants in that case argued that plaintiffs' claims would duplicate the futures markets claims because the farmers had engaged in hedging, the court of appeals never addressed that argument.

d) suppliers' hedging profits

Plaintiffs argue that any hedging engaged in by their suppliers should be ignored because there is no evidence that their suppliers lost any money hedging and therefore no reason why they would want to submit claims in the pending futures market litigation. Plaintiffs miss the point. The issue is not whether the suppliers had net profits but whether they were injured by artificially high prices. If a manipulation caused the suppliers to make less money on their trades than they would have made without the manipulation, they have a potential claim.

In summary, in order to be sure of avoiding the risk of multiple liability, it would be necessary to determine whether plaintiffs had bought copper cathode that had been

previously purchased by a supplier, whether the copper cathode had been made from pre-cathode copper purchased from outside sources, whether the supplier hedged its sale to plaintiffs and in what manner and whether the supplier would have a futures market claim derived from that hedging. Plaintiffs have not shown how such a determination might be made. It is not self-evident.

3. Injury that antitrust laws were designed to prevent

The third inquiry is whether the injury is one that the antitrust laws were designed to prevent and whether it flows from defendants' illegal conduct. This inquiry has no independent significance in this case that I can discern. Its importance lies in helping courts identify injuries that are caused by illegal conduct and "connect the alleged injury to the purposes of antitrust laws." II Areeda & Hovenkamp, *supra*, ¶ 361. It can play a part in weeding out injuries that are not antitrust injuries, such as those caused by competition. In *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477 (1977), for example, Pueblo, an operator of bowling centers was held not to have standing to sue Brunswick even though it could show that Brunswick's acquisition of failing bowling centers was a violation of the antitrust laws. The impediment to suit was Pueblo's inability to show that it would suffer an antitrust injury from the acquisitions. Pueblo was seeking damages for increased competition; increasing competition is what the antitrust laws are intended to encourage. Therefore, Pueblo was not damaged in the antitrust sense when it was "deprived of the benefits of increased concentration." *Id.* at 488.

As alleged, defendants' market manipulations constitute antitrust violations. The question is whether plaintiffs' injuries flowed from that conduct or whether, as discussed above, the connection is so indirect that it cannot be said that the antitrust laws were intended to protect plaintiffs from the conduct.

4. Complexity of damages calculation

I turn to the fourth inquiry, which is whether the damages claimed measure the injury in a reasonably quantifiable way. The short answer is that they do not. As I have explained, just the task of tracing what happened to the copper at issue is a daunting challenge. Calculating damages for these plaintiffs would be the kind of massive and complex undertaking that the Supreme Court has warned against. *See Associated General Contractors v. Carpenters*, 459 U.S. 519, 545 (1983) ("massive and complex damages litigation not only burdens the courts, but also undermines the effectiveness of treble-damages suits") (citing *Illinois Brick*).

Like the plaintiff in *In re Copper Antitrust Litigation (Ocean View Capital, Inc. v. Sumitomo)*, M.D.L. Dkt No. 1303 (W.D. Wis. July 23, 2001), plaintiffs fall back on the possibility of statistics and estimates as a means of determining both the amount of "first purchase" copper they acquired and the damages sustained as a result of those acquisitions. It is notable, however, that they do not suggest how such a statistical analysis would proceed, what data they would rely upon to make the estimates or how they would tie average amounts of copper purchases to prices paid in a particular month. Moreover, as I have noted, plaintiffs have shied away entirely from the inordinately difficult problem of

disentangling the premium from the indexed price, saying simply that they are not pursuing any claim for any artificiality in the premium amount.

I conclude that plaintiffs fail the *Associated General Contractors* test for antitrust standing. Defendants are entitled to summary judgment on this issue.

## II. RICO CLAIMS

As plaintiffs admit in their brief in opposition to defendants' motion for summary judgment, dkt. #369, the considerations required to show that a racketeering act was the proximate cause of their injury are similar to those set out in *Associated General Contractors*, 459 U.S. 519 (1983). *See Holmes v. SIPC*, 503 U.S. 258 (1992) (applying to RICO same approach that *Associated General Contractors* developed for antitrust); *International Brotherhood of Teamsters v. Philip Morris*, 196 F.3d 818, 825-26 (7th Cir. 1999) (denying standing to labor union and trust fund to assert RICO claims because the "injury for which the plaintiffs seek compensation is remote indeed, the chain of causation long, the risk of double recovery palpable because smokers can file their own RICO suits, and the damages wickedly hard to calculate").

Plaintiffs cannot satisfy the requirements for antitrust standing under *Associated General Contractors*. Therefore, their claim for standing to assert RICO claims fails as well.

## III. FEDERAL COMMON LAW CLAIMS

In their second amended complaint, plaintiffs alleged that defendants knowingly misrepresented and concealed

material facts from plaintiffs with the intention that plaintiffs would rely on defendants' misrepresentations and omissions to their detriment, as participants in the copper cathode market, and that plaintiffs would be kept from learning of defendants' covert and illegal conduct. This fraud on the market theory of liability derives from *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988), a case in which the Supreme Court held that the ordinary requirement of reliance can be presumed in a case in which the plaintiff alleges that he was injured by misleading statements regarding the value of stock of a particular company.

> "The fraud on the market theory is based on the hypothesis that, in an open and developed securities market, the price of a company's stock is determined by the available material information regarding the company and its business. . . . Misleading statements will therefore defraud purchasers of stock even if the purchasers do not directly rely on the misstatements. . . . The causal connection between the defendants' fraud and the plaintiffs' purchase of stock in such a case is no less significant than in a case of direct reliance on misrepresentation."

*Id.* at 242 (quoting *Peil v. Speiser*, 806 F.2d 1154, 1160-61 (3d Cir. 1986)). The Court distinguished the "modern securities markets, literally involving millions of shares changing hands daily [] from the face-to-face transactions contemplated by early fraud cases." *Id.* at 243-44.

If plaintiffs could show that the prices for their purchases of physical copper turned solely on the futures market prices, *Basic Inc.* would relieve them of any need to prove that they had relied on defendants' misrepresentations in each transaction. As I have found however, plaintiffs cannot make such a showing. Even if it were sufficient to show a fraud on the market simply by proving that a portion of the total price for a particular copper transaction was artificially high as the result of misrepresentations, plaintiffs have not come forward with any evidence that they could disentangle the allegedly affected price from the total price paid. The undisputed evidence is that the prices plaintiffs paid for copper cathode purchases were arrived at only after vigorous negotiation of the purchase price and that the indexed price was only one component of the total price.

## IV. STATE LAW CLAIMS

Plaintiffs have asked that the court relinquish jurisdiction over the state law claims if the federal claims are dismissed. That request will be granted. Defendants oppose it, understandably, because they would prefer to have all of the claims resolved at this time. However, federal courts are generally admonished not to retain jurisdiction over state law claims when the federal basis for jurisdiction has disappeared except in a few limited circumstances, none of which exists in this case. The statute of limitations has not run on the state law claims, the litigation has not proceeded so far in this court that it would cause another court an unwarranted duplication of effort to decide the state law claims and the state law claims are neither frivolous nor so clear that there is no doubt how they should be decided. *Wright v. Associated Insurance Cos.*, 29 F.3d 1244, 1251 (7th Cir. 1994). *See also Groce v.*

*Eli Lilly & Co.*, 193 F.3d 496 (7th Cir. 1999) ("it is the well-established law of this circuit that the usual practice is to dismiss without prejudice state supplemental claims whenever all federal claims have been dismissed prior to trial"); *Wentzka v. Gellman*, 991 F.2d 423, 425 (7th Cir. 1993) (retention of jurisdiction over state law claims improper when state law was unsettled); 28 U.S.C. § 1367(c)(1) (district court may decline to exercise supplemental jurisdiction if claim raises novel or complex issue of state law).

Defendants suggest that the court can decide the state law claims easily because the issues are neither novel nor complex. They are wrong. Plaintiffs' claims raise difficult factual and legal issues. For example, plaintiffs contend that they have significant contacts with each of the ten states whose laws they are relying upon; defendants dispute this contention vigorously, saying that it is obvious that plaintiffs have limited contacts at best. Defendants say that these limited contacts defeat plaintiffs' claim because plaintiffs would not be allowed to sue for antitrust damages in a state if it could not be said that the state legislature had the intent to remedy injuries such, as those alleged that were suffered by non-residents. Defendants add that to the extent a state legislature would try to legislate remedies for injuries suffered outside the state by non-residents, it would be running afoul of the commerce clause of the United States Constitution. Defendants may be correct but their contention does not end the inquiry. It would be necessary to determine the exact extent of plaintiffs' contact with each of the ten states, which is a complicated and controverted matter. It would take considerable time and careful research to determine the amount of contact required to avoid commerce clause questions or to insure that the state legislature intended to

expand antitrust remedies to persons in the position of these plaintiffs. The relationship of state laws to the commerce clause is a complex subject in and of itself.

Plaintiff Viacom is a resident of New York. It might have sufficient contact with New York to bring it under the reach of the state's antitrust laws and avoid any commerce clause problems. If so, it would be necessary to decide whether New York law permitted antitrust actions by indirect purchasers before 1998, when it passed its "*Illinois Brick*" repealer statute. Only one court has ruled on this question; it was not a New York court but a federal district court in Washington, D.C. The federal court's decision may well be the correct resolution of the question but until a New York court rules on the matter, it cannot be said that the question has been settled.

Defendants suggest that a choice of law analysis might resolve the matter; plaintiffs say such an approach is ludicrous. Obviously, this is not a clear cut issue. Defendants argue that the question of plaintiffs' claims for relief under state law is not a difficult one because the states that have adopted repealer statutes have not rejected the holding in *Associated General Contractors* that governs the disposition of the federal antitrust claims in this case. Even if defendants are correct, it does not follow that it would be possible simply to adopt the *Associated General Contractors* analysis used in this case for the state law claims. It would be necessary to consult the relevant state law to see exactly how the courts in that state have interpreted and applied the analysis. In short, there are enough knotty questions of state law that retaining jurisdiction over plaintiffs' state law claims would require an unseemly intrusion into matters of state law.

**ORDER**

**IT IS ORDERED** that

1. The motion for partial summary judgment filed by plaintiffs Viacom Inc. and Emerson Electric Co. is DENIED;

2. The motion for summary judgment filed by defendants Global Minerals and Metals Corporation and Credit Lyonnais Rouse, Ltd., is GRANTED in full except with respect to plaintiffs' state law claims;

3. Jurisdiction over plaintiffs' state law claims is relinquished and they are DISMISSED, without prejudice;

4. Defendants' motion to strike the affidavit of Paul Dewison and its accompanying affidavits is GRANTED;

5. Defendant Credit Lyonnais Rouse's motion to strike the June 12, 2001 affidavit of Reginald R. Smith and its attached documents is GRANTED;

The clerk of court is directed to enter judgment for defendants on all of plaintiffs' claims except their state law claims and close this case.

Entered this 24th day of August, 2001.

BY THE COURT:
/s/ Barbara B. Crabb
BARBARA B. CRABB
District Judge

## APPENDIX C

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF WISCONSIN**

**MDL No. 1303**
**Nos. 99-C-0801-C, 00-C-0528-C**

**[Filed July 23, 2001]**

In re COPPER ANTITRUST LITIGATION

| | |
|---|---|
| Ocean View Capital, Inc., f/k/a Triangle Wire & Cable, Inc., Plaintiff, | ) |
| v. | ) |
| Sumitomo Corporation of America, Sumitomo Corporation, Sumitomo Futures Corporation, Global Minerals and Metals Corporation, David Campbell, and Credit Lyonnais Rouse, Defendants. | ) |
| Ocean View Capital, Inc., f/k/a Triangle Wire & Cable, Inc., Plaintiff, | ) |
| v. | ) |
| J.P. Morgan & Co., Incorporated and Morgan | ) |

Guaranty Trust Company of New York, )
Defendants. )
)

## OPINION AND ORDER

CRABB, District Judge.

Plaintiff Ocean View Capital, Inc. brought these two antitrust actions for damages, alleging in Case No. 99-C-0801-C that it had been injured by conspiratorial actions taken by defendants Sumitomo Corporation of America, Sumitomo Corporation, Sumitomo Futures Corporation, Global Metals and Minerals Corporation, David Campbell and Credit Lyonnais Rouse in violation of the antitrust laws of the United States. It alleged that "[b]eginning in 1990, if not earlier, and continuing through June 13, 1996, defendants conspired to manipulate and corner and did manipulate and corner the market for physical copper and copper futures." Amended Compl., p 22. Plaintiff sued defendants J.P. Morgan & Co., Incorporated and Morgan Guaranty Trust Company of New York in Case No. 00-C-0528-C for participating in the conspiracy and helping to effectuate it by providing capital to the Sumitomo defendants and helping to conceal the existence of the conspiracy. Plaintiff alleged that defendants' actions had caused it harm because it had been forced to pay higher prices for the physical copper it purchased as a direct and predictable consequence of the manipulation of the futures market and the cornering of the physical market for copper. The cases were consolidated with others in this court by order of the Judicial Panel on Multidistrict Litigation. Jurisdiction is present. 28 U.S.C. § 1331, 15 U.S.C. § 15.

The two cases are now before the court on motions for summary judgment filed by all defendants, who contend that plaintiff lacks standing under the antitrust laws to bring this action. Defendants acknowledge that the allegations of plaintiff Ocean View Capital's original complaint were sufficient to survive a motion to dismiss for failure to state a claim, *see In re Copper Antitrust Litigation*, 98 F.Supp.2d 1039 (2000), but assert that with the completion of discovery on the standing issues, it has become evident that plaintiff lacks antitrust standing. The Morgan defendants advance the same arguments as the other defendants. In addition, they have moved to dismiss the complaint against them on the ground that plaintiff's allegations do not state an antitrust violation against them. I conclude that plaintiff lacks antitrust standing to bring an antitrust action against the moving defendants in both cases for a variety of reasons, including the indirectness of plaintiff's injury and the difficulty of calculating the damages to which it would be entitled. Therefore, I will grant defendants' motions for summary judgment. Plaintiff made a request in its brief for summary judgment in its favor but has shown no reason why its request should be granted. Its unsupported motion for summary judgment will be denied. The disposition of the other motions makes it unnecessary to address the Morgan defendants' motion to dismiss, which is based on its contention that plaintiff has failed to allege an antitrust violation against them.

From the facts proposed by the parties, I find that the following are material and undisputed.

## UNDISPUTED FACTS

### A. The Parties

Plaintiff Ocean View Capital, Inc., f/k/a Triangle Wire & Cable, Inc., is a corporation organized and existing under the laws of Delaware, with its principal place of business in Rhode Island. Between 1990 and 1996, plaintiff was engaged in the manufacture of copper wire and cable. Defendant Sumitomo Corporation of America is a corporation organized and existing under the laws of New York with its principal place of business in New York. Defendant Sumitomo Corporation is a corporation organized and existing under the laws of Japan with its principal place of business there. Defendant Sumitomo Corporation Futures, Inc. is a corporation organized and existing under the laws of Delaware. Defendant Global Minerals and Metals Corporation is a corporation organized and existing under the laws of Delaware. It is a trader of physical copper and copper futures. Defendant David Campbell was a principal of Global at times relevant to this suit. Defendant Credit Lyonnais Rouse is a foreign corporation authorized to do business in the state of New York.

### B. The Copper Market

#### 1. Production of copper

In manufacturing building wire, cable and other copper products, plaintiff used copper rod, which is fabricated from copper cathode. Between 1990 and 1996, the vast majority of copper rod was manufactured in a four-step process. The first step involved extracting copper ore from a

mine and placing it in a concentrator to be crushed, milled and treated with a variety of chemicals to extract the minerals and then turned into a powder or gravel-like substance called copper concentrate, which is between 18 to 50% copper. The second step of the process is smelting, which separates the nonferrous metals in the copper concentrate from other minerals, such as sulfur and iron. Smelters also melt and process various forms of copper scrap, such as the copper that remains unused when copper rod is made into copper wire as well as used copper wire itself. Smelters produce "blister" or "anode" from concentrate and scrap. Anode products are one-meter square plates of approximately 98 to 99% copper.

In the third step of the manufacturing process, anode (or blister or copper scrap) is refined electrolytically in a tank of electrolyte containing sulfuric acid and other chemicals. A "starter sheet" of pure copper is placed in a tank where an electrical charge is passed through the electrolyte for several days, causing the copper atoms from the anode to migrate through the acid and accumulate on the starter sheet. The final product is a one-meter square plate, "copper cathode," that is more than 99% copper. In the fourth step, continuous cast copper rod is fabricated from cathode at a rod mill, where cathode or scrap or both are fed into a furnace and melted as they descend through the furnace. At the bottom, spouts direct the molten metal onto a casting wheel that produces a solid bar of copper, which is then processed through a series of dies that gradually reduce the size of the bar to a 5/16" diameter. In terms of chemical composition, the rod is identical to copper cathode; only its appearance has changed.

2. Market participants

Players in the copper market include integrated producers, semi- fabricators, producers, traders, scrap dealers and end users, among others. Integrated producers extract copper ore from mines and process it through the stages of concentrate, blister, anode and cathode. Some have the facilities to fabricate cathode into rod. Despite their ownership of production facilities, producers routinely supplement their own production with scrap, concentrate, blister, anode, cathode and rod bought from unaffiliated producers and traders or from affiliated facilities in which they own partial interests. As a general rule, in buying from affiliated facilities, the producer pays the same price for copper that an unaffiliated entity would pay.

The producers that sold rod to plaintiff owned rod mills. Other rod mills exist that are owned by independent companies known as "semi-fabricators." These semi-fabricators obtain cathode and scrap from producers or trading companies and make it into rod. In addition, they will accept cathode from manufacturers such as plaintiff and convert it into rod for a fabrication fee under an arrangement known as "tolling."

Integrated producers purchase copper from outside sources for a number of reasons. First, the copper is expensive to move. In many instances, it is more economical for the producer to purchase copper from a third party near the delivery point than to transport it. Second, marketing opportunities may arise that a producer cannot exploit if it relies solely on its own production capacity or if it has oversold product in advance or if it is undergoing renovation

or expansion of its production facilities. Third, there may be mismatches among a producer's facilities. The mines might not be producing enough ore to keep the smelters operating efficiently or the smelter not making enough blister to fill the refinery's capacity. Fourth, a facility might be temporarily inoperable as a result of flood, earthquake, strike or other unforeseen event.

Trading companies buy and sell copper in the form of concentrate, anode, blister, cathode and scrap but do not own or operate any facilities to process copper. All of the trading companies that sold copper to plaintiff purchased the copper from producers, semi-fabricators and other trading companies.

Semi-fabricators own and operate rod mills or convert cathode into tubing or rod into wire. Like traders, semi-fabricators do not own mines or concentrators and generally do not own smelters or refineries. Semi- fabricators purchase cathode from producers and traders and fabricate the cathode into rod. Some semi-fabricators have the facilities to convert scrap into cathode, which they then fabricate into rod. In addition, semi- fabricators enter into "tolling arrangements" with customers under which they use cathode supplied by the customer to produce rod. In those situations, the semi-fabricator charges the customer only for the cost of conversion and delivery (the rod premium).

3. Copper pricing

On a daily basis, producers, traders, semi-fabricators, scrap dealers and end-users such as plaintiff buy and sell copper in the form of concentrate, blister, anode, cathode, rod

and scrap at prices set with reference to the copper prices on the Commodity Exchange, Inc. division of the New York Mercantile Exchange (Comex) or the London Metal Exchange. Between 1990 and 1996, plaintiff purchased copper in the form of rod and cathode. Plaintiff was not trading on the futures exchanges allegedly manipulated by defendants.

Plaintiff "tolled" most of the cathode it purchased with rod mills pursuant to tolling agreements. Also, it purchased cathode that it resold at a profit. In all these sale and re-sale transactions, the purchase price of the cathode was set with reference to Comex.

Most of the copper plaintiff purchased was in the form of rod that it used to manufacture building wire and other products. The price it paid for rod was based on a formula that was a combination of four elements: 1) an exchange-based price formula; 2) a cathode premium; 3) a rod or "shaping" premium; and 4) shipping charges. The exchange-based price formula was set with reference to Comex.

The cathode premium was designed to account for the difference between buying a single contract on the Comex for an unknown brand of copper at an unknown Comex warehouse location and buying a known brand of copper on a known date with a known quality, as well as more favorable payment terms. The premium was influenced by market forces such as perceptions of supply and demand and the prices competitors were charging. Like the cathode premium, the rod premium was influenced by market forces of supply and demand and reflected factors such as the cost of conversion of cathode into rod.

The shipping charge was the cost of shipping the rod to plaintiff. It could vary with transportation rates and the availability of discounts offered by the supplier. These might be proximity discounts determined by the distance from the supplier, the creditworthiness of the buyer, the supplier's interest in gaining the buyer's business and other offers the buyer might have received. Plaintiff negotiated the cathode and rod premiums and shipping charges with each supplier separately.

In manufacturing building wire and cable, plaintiff produced scrap copper, some of which it sold to scrap dealers for cash at prices set by reference to Comex. Also, plaintiff exchanged scrap copper for copper cathode that it tolled with rod mills or producers. The value of the scrap copper was set by reference to the published scrap prices that were set by reference to Comex.

Although the prices of all forms of physical copper are set by reference to prices on the futures markets, there is no single Comex or London Metal Exchange price quoted and used by all physical market participants at any one time. Comex quotes 24 different prices, one each for delivery in the present month and each month up to two years in the future. Participants in the physical copper market also use Comex intra-day prices to set the prices of the copper they buy and sell. Purchasers of physical copper utilize a variety of exchange based formulas to set the price of the copper at the same time in light of their own particular pricing strategies, which are driven by their own views of supply and demand. For example, between 1990 and 1996, cathode and rod were bought and sold utilizing such formulas among others as 1) the Comex month average price for the month of delivery; 2)

the Comex price at a particular time during the month of delivery; 3) forward fixed pricing; and 4) the previous day's Comex closing price. At various times between 1990 and 1996, plaintiff used each of these formulas to set the price of the rod it purchased. To various degrees, the pricing formula employed will protect the purchaser from the effects of a manipulation of the underlying index that is used as reference point.

The premiums and discounts that are components of the price of various forms of physical copper are heavily influenced by market forces of supply and demand and will vary over time and from supplier to supplier. The effect of changes in Comex or the London Metal Exchange prices on the prices that purchasers pay for physical copper will therefore vary over time (and between suppliers) because those prices are affected directly by supply and demand factors as well as published exchange prices.

The numerous exchange-based pricing formulas used in the purchase of physical copper and the existence of market-driven premiums and discounts that vary over time and among suppliers mean that the effects of a futures market manipulation would be neither direct nor predictable. For example, the prices paid for physical copper delivered in July 1995 could have varied by as much as 90%, depending on which pricing formulas were used. According to fundamental principles of economic theory, physical prices tend to diverge from futures market prices, rather than exhibit a direct and predictable cause and effect relationship.

The primary product that plaintiff bought between 1990 and 1996 was continuous cast copper rod. During that

time period, continuous cast copper rod was not traded on the London Metal Exchange or Comex or stored in exchange warehouses.

## C. Plaintiff's Suppliers

### 1. Magma Metals Corporation

Between 1990 and 1996, plaintiff purchased rod from Magma Metals Corporation. In 1996, Magma was acquired by BHP Copper, Inc. Plaintiff continued to make purchases from BHP. (I will refer to both corporations as Magma.) Magma owned and operated mines in the United States, as well as a smelter, refinery and rod mill. It purchased copper in various forms from third parties in order to make cathode and rod and sell them to its customers such as plaintiff. Between 1990 and 1996, Magma purchased concentrate both from traders and from numerous third parties, including Asarco, Cyprus Minerals, Cananea Mines, Grupo Mexico, Kennecott and BHP. Magma acquired concentrate from 23 different mines, five of which it owned in full, two of which it owned in part and 16 in which it had no ownership interest. Magma made these third-party purchases because its own smelter's capacity was substantially larger than the production capacity of its mines and because it was not economically feasible to operate the smelter at less than full capacity. Magma's purchases from non-affiliated smelters (those in which it had no ownership interest) and traders accounted for between 37 and 40% of the concentrate it used in its refining operations. The price it paid for concentrate was set with reference to either Comex or the London Metal Exchange, less refining and treatment charges that were negotiated by the parties.

Magma sold copper concentrate to producers and dealers, including Metals & Commodity, Glencore, Cyprus, Kennecott, Phelps Dodge, Metals Concentrates International, Inc. and Asarco.

Between 1990 and 1996, Magma purchased blister from third parties, such as Cox Creek Refining Corporation and Kennecott and used it to make cathode. It purchased anode from third parties such as Kennecott and sold it to third parties such as Cyprus, Kennecott, Phelps Dodge, Southwire and Noranda. It used the anode it purchased to make copper cathode. In addition, Magma purchased copper scrap from traders and processed it into cathode. Although it produced cathode, it also purchased a substantial amount of cathode from third parties in order to fulfill its obligations to its cathode customers. It also fabricated some of this cathode, including Magma brand cathode it repurchased from third parties, into rod that it sold to its rod customers such as plaintiff. The prices Magma paid for the anode, blister, cathode and scrap were set with reference to either Comex or the London Metal Exchange. The price at which it sold anode was set with reference to either Comex or the London Metal Exchange.

2. ASARCO Incorporated

Between 1990 and 1996, plaintiff purchased copper from ASARCO Incorporated, primarily in the form of rod but also as cathode. Asarco owned and operated copper mines, smelters, refineries and rod mills in the United States. Although it was a copper producer, it purchased copper in various forms from third parties in order to make the cathode and rod that it sold to plaintiff and others. Asarco purchased

concentrate from producers and traders because the capacity of its smelters was larger than that of its mines. Although Asarco wholly owned three mines in Arizona and had partial interests in 13 other mines in North and South America, it obtained concentrates from 50 mines around the world, as well as from traders. Asarco obtained blister and anode from 12 different smelters. Two of these were wholly owned by Asarco, three were partially owned and the remainder were not affiliated with Asarco. Asarco made the purchases because the capacity of its refinery exceeded the capacity of its smelters. Asarco also purchased small amounts of scrap for use in making cathode. Between 1990 and 1996, Asarco's purchases of concentrate, anode, blister and scrap from non-affiliated sources accounted for at least 41% of the copper that Asarco used to make its own brand of cathode at its Amarillo refinery. The prices Asarco paid for the concentrate, anode and scrap it purchased were set by reference to Comex.

Between 1990 and 1996, Asarco purchased cathode from third parties. In some instances, it repurchased its own brand of cathode. It tended to oversell its maximum production capacity by two to three percent each month in the expectation that a number of its purchasers would buy less than they had contracted for and it preferred to use its own brand of cathode for delivery to Amarillo for rod fabrication. Between January 1993 and June 1996, Asarco purchased at least 153,000,000 pounds of cathode for delivery to its Amarillo facility. As a general rule, the price Asarco paid for the cathode it purchased from third parties was set according to a base price of the Comex month average as well as a premium.

3. Phelps Dodge Corporation

Between 1990 and 1996, plaintiff purchased rod from Phelps Dodge Corporation. Plaintiff contracted with Phelps Dodge to toll cathode that plaintiff had obtained from third parties in exchange for scrap. Phelps Dodge owned and operated mines and smelters in the United States, as well as an electrolytic refinery and rod mill in El Paso, Texas, and a rod mill in Norwich, Connecticut. Approximately 67% of the rod that plaintiff purchased from Phelps Dodge came from the Norwich rod mill; the remainder came from the El Paso rod mill.

Although Phelps Dodge is an integrated producer, it also made purchases from third parties of substantial amounts of copper that it used to make the cathode and rod it sold to customers such as plaintiff. Between 1990 and 1996, Phelps Dodge bought concentrate from a number of third parties, including Asarco, Cyprus and traders, for use in its smelters (both wholly owned and partially owned). Phelps Dodge acquired concentrate from 25 mines, three of which it wholly owned, six of which it partially owned and 16 in which it had no ownership interest. The concentrate Phelps Dodge purchased from third parties was incorporated into its manufacturing process and used to make cathode and rod at its El Paso refinery and rod mill. Like other integrated producers, Phelps Dodge purchased concentrate from third parties because its mines did not produce sufficient quantities of concentrate to enable it to operate the mines at optimal capacity. From time to time it purchased scrap for processing in its smelters. Phelps Dodge also bought and sold anode that it processed at the El Paso refinery for cathode. The anode and blister it purchased from third party producers for its El

Paso refinery originated from 13 smelters, one of which Phelps Dodge wholly owned, three of which it partially owned and nine in which it had no ownership interest.

Twelve percent of the copper Phelps Dodge used in its El Paso refinery to create cathode came from sources in which Phelps Dodge had no ownership interest. Only 16% of the copper it processed came from wholly owned facilities. Between 1992 and 1996, Phelps Dodge purchased more than 192,000,000 pounds of blister and 37,000,000 pounds of scrap for its El Paso operations. Between 1990 and 1996, Phelps Dodge purchased more than 750,000,000 million pounds of cathode from other producers and traders for use in its Norwich rod mill. It was more cost-effective to purchase third party cathode for the Norwich facility than to ship cathode from Texas to Connecticut. During this same period, Phelps Dodge purchased more than 65,000,000 pounds of cathode for use at its El Paso rod mill. The prices Phelps Dodge paid for cathode, concentrate, blister, anode and scrap were set with reference to Comex or the London Metal Exchange.

4. Cyprus Copper Marketing Corporation

In 1995, plaintiff purchased 616,651 pounds of copper from Cyprus Copper Marketing Corporation. This was less than one-quarter of one percent of the copper plaintiff purchased between 1994 and 1996. Cyprus purchased a small amount of concentrate from third parties for use in its refining operations. Beginning in 1995 or 1996, it also purchased cathode from third parties.

5. Minemet, Inc. and Pechiney World Trade USA, Inc.

Between 1990 and 1996, plaintiff purchased cathode and rod from Minemet, Inc. and Pechiney World Trade USA, Inc. (Pechiney acquired the assets of Minemet in 1994.) Pechiney and Minemet were trading companies that did not own mines, concentrators, smelters or refineries. All of the copper they sold to plaintiff had been purchased from third parties. Some or all of the rod that plaintiff purchased from Minemet and Pechiney had been fabricated by Westinghouse. Minemet and Pechiney paid Westinghouse for the cathode that was in the rod sold to plaintiff, plus a fee for fabricating the rod. Westinghouse purchased the cathode from third parties. Between 1990 and 1996, Pechiney and Minemet bought and sold various forms of physical copper, including copper ore, concentrate, blister, cathode, rod and scrap from and to producers, traders and semi-fabricators, including other companies that sold copper to plaintiff such as Asarco, Magma, Gerald Metals, Southwire, Westinghouse and AmRod.

6. Gerald Metals, Inc.

Between 1990 and 1996, plaintiff engaged in copper-related transactions with Gerald Metals, Inc. Gerald was an international trader of copper that bought and sold copper concentrate, anodes, blister, cathode and scrap from a number of companies, including Asarco, Magma, Kennecott, Essex Group, Phelps Dodge and Pechiney. The prices of the purchases and sales were set with reference to either the Comex or the London Metal Exchange. Gerald did not own any mines, concentrators, smelters or refineries. Any copper

it sold to plaintiff had been purchased previously from third parties.

From 1990 until the middle of 1993, plaintiff sold scrap to Gerald. Generally, plaintiff received cash in exchange for the scrap; on occasion, Gerald supplied plaintiff with cathode or rod. After mid-1993, plaintiff usually received cathode from Gerald in exchange for scrap and arranged with Gerald for the cathode to be sent to a rod mill where it was fabricated into copper rod.

7. Traders

Between 1990 and 1993, plaintiff purchased copper from Barclays Metals, Deek International, Elders Raw Materials, Mitsubishi Materials (America) and Prudential Bache. All of these companies were trading companies that bought copper from third parties and resold that copper to third parties. All of the copper that these trading companies sold to plaintiff would have been purchased by them from third parties. Plaintiff's purchases from Mitsubishi and some of its purchases from Barclays consisted of purchases of cathode that plaintiff resold at a profit to traders.

8. Semi-fabricators

Between 1990 and 1996, plaintiff purchased rod from AmRod Corporation, a semi- fabricator. Plaintiff used AmRod to toll cathode that plaintiff obtained from third parties. AmRod owned a rod mill in which it fabricated cathode into rod. It did not own any mines, concentrators, smelters or refineries. All the cathode AmRod used to make rod was purchased from third parties, including Noranda,

Asarco, Codelco, Kennecott, Gerald Metals and Minemet, at prices set with reference to Comex.

Between 1990 and 1996, plaintiff purchased rod from Southwire Company, a semi-fabricator. (Plaintiff had some tolling arrangements with the company as well.) Southwire owned and operated a rod mill and wire mill, as well as facilities to convert copper scrap that it obtained from scrap traders into cathode that was then fabricated into rod. It did not own or operate any mines or concentrators. It purchased cathode from producers and traders, including Asarco, Gerald, Pechiney and Minemet. Occasionally, it bought cathode from sources in Chile and Peru. Most of the cathode it purchased or made from scrap was converted into rod. Also, Southwire sold cathode to third parties, including manufacturers and traders. The prices at which it purchased and sold cathode were set by reference to either Comex or the London Metal Exchange. All of the copper rod Southwire fabricated was made from copper it had obtained from third parties. Southwire tolled scrap copper obtained from plaintiff into rod. Approximately 15% of the rod plaintiff received from Southwire came from scrap supplied by plaintiff.

D. Copper Sources

Copper is fungible and loses its identity as it is processed, refined and fabricated into rod, making it impossible to determine the source of the copper in any particular pound of cathode or rod. Magma, Phelps Dodge, Asarco, Pechiney, AmRod and Westinghouse are unable to trace the sources of particular copper sold to plaintiff or fabricated into a particular pound of cathode or rod.

E. Hedging

Participants in the physical copper market who contract to buy and sell copper are exposed to the risk that price fluctuations will reduce the value of their copper. Purchasers are exposed to the risk that copper prices will decline before they sell their copper. Parties who agree to sell copper at a given price at a future date are exposed to the risk that copper prices will increase above the contracted price. To protect against the risk of price fluctuations, producers, traders and semi-fabricators routinely use the futures markets (Comex or the London Metal Exchange) to hedge their physical obligations and shift their price risk to their counterparts in the market. All but one of plaintiff's suppliers hedged all or part of their physical obligations.

Gerald, Pechiney and Minemet managed their price risk by hedging on Comex or the London Metal Exchange. AmRod managed its price risk by hedging on Comex. Southwire managed its price risk for some of its transactions, including all forward priced sales, by hedging on Comex. Magma managed its forward priced sales by hedging on Comex or the London Metal Exchange. Asarco used a variety of hedging strategies: it hedged its future physical production to establish a floor price for that production; it hedged its monthly physical obligations to balance its books (selling copper futures contracts, for example, in months in which it had sold less copper than it had purchased); and it hedged sales transactions with customers when those customers forward priced or placed an order for a future date at a fixed price. In these instances, Asarco offset the sale with a futures contract on Comex.

Phelps Dodge regularly hedged its physical copper obligations by buying and selling futures contracts on Comex in order to lay off its price risk onto the market. In situations in which a Phelps Dodge customer forward priced one month into the future, Phelps Dodge would sometimes hedge the sale through a back-to-back physical transaction, by simultaneously entering into an agreement to purchase that same quantity of rod at the same fixed price so as to avoid any price risk.

The purpose of all the hedging strategies is to protect the hedger from price fluctuations by transferring that risk to participants in the futures market.

Plaintiff used copper rod to manufacture building wire and other copper products. Because the price of copper accounted for roughly 80% of plaintiff's manufacturing costs, the price and availability of copper would have had a significant effect on plaintiff's production costs and sales prices. The cost of building wire closely follows the copper market. Comex was the overriding factor that affected the market price of plaintiff's copper-end products on a day-to-day basis.

F. Direct Purchases from Defendants

Between 1990 and 1996, plaintiff never purchased any copper from any of the defendants, with the exception of a series of transactions with defendant Sumitomo Corporation of America in 1992. These transactions took the form of simultaneous purchases and sales and were made to enable Sumitomo to obtain copper in more favorable locations. They involved fewer than 11,000,000 pounds of copper and less

than $12,000,000. The documents reflecting the transactions do not show which party received more money as a net result of the transactions.

G. Other Litigation

In 1996, two lawsuits were filed in California state court arising out of the alleged manipulation of the price of copper between January 1, 1993 and July 1, 1996, by defendants Sumitomo Corporation of America, Global Metals and Minerals and Campbell. The suits were filed as class actions on behalf of all persons who had purchased copper products, defined to include concentrate, blister, anode and cathode, between January 1, 1993 and July 1, 1996, and who at the time of the purchases resided in a group of defined states, purchased copper products from persons residing in one of those states or purchased any copper for delivery in one of those states. The actions were settled. In connection with the settlement, BHP/Magma, Asarco and Gerald filed proofs of claim that were allowed in the following amounts: 1) BHP/Magma, $1,167,298,575.00; 2) Asarco, $543,128,847.00; and 3) Gerald, $95,790,545.61. BHP/Magma received a payment from the settlement fund of $1,768,148.22; Asarco received $822,696.37; and Gerald received $145,097.31.

In 1996, a lawsuit was filed by futures traders in the United States District Court for the Southern District of New York arising out of the alleged manipulation of the price of copper futures and options contracts between June 20, 1990 and June 19, 1996, by defendants Sumitomo Corporation of America, Global Metals and Minerals and David Campbell.

OPINION

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides a federal cause of action to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." Plaintiff contends that it fits within the provisions of this statute: it has suffered injury to its business of manufacturing building wire (by having to pay higher prices for the copper cathode and copper rod it purchased) as a result of defendants' violation of section 1 of the Sherman Act, 15 U.S.C. § 1, which forbids conspiracy in restraint of trade. A review of the text of s 15 would suggest that plaintiff is correct. In reality, however, the language of the Clayton Act is not as broad as it seems. For practical reasons, it has been narrowed by the Supreme Court in an effort to effectuate the congressional intent that the act be construed in light of its common law background. *See Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 531, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983) (quoting Senator Sherman's statement that proposed law "does not announce a new principle of law, but applies old and well recognized principles of the common-law to the complicated jurisdiction of our State and Federal Government") (21 Cong.Rec. 2456). *See also National Society of Professional Engineers v. United States*, 435 U.S. 679, 687-88, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978): "Congress, however, did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations. The legislative history makes it perfectly clear that [Congress] expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition." *See also Blue Shield of Virginia v. McCready*, 457 U.S. 465, 477, 102 S.Ct. 2540, 73 L.Ed.2d

149 (1982) ("It is reasonable to assume that Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property").

After 111 years of interpretation, certain principles have evolved to define antitrust standing, which is distinct from Article III standing. In both instances, the plaintiff must plead an injury in fact but in antitrust cases, "the court must make the further determination whether the plaintiff is a proper party to bring a private antitrust action." *Associated General Contractors*, 459 U.S. at 535 n. 31, 103 S.Ct. 897. Plaintiffs must show not only that they have suffered the type of injury that the antitrust laws were intended to prevent and that their injuries are a result of defendant's unlawful conduct, *see, e.g., Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977), but that they are in the best position to vindicate the alleged violation because their injuries are neither indirect nor secondary in nature. *See Associated General Contractors*, 459 U.S. at 537-45, 103 S.Ct. 897. In determining which plaintiffs are best placed to sue, courts consider the causal connection between the alleged antitrust violation and the harm to the plaintiff and the defendant's intent to cause the harm; whether the injury was of a type the laws were designed to prevent; the directness or indirectness of the alleged injury; the existence of more direct victims who can assert a claim against the wrongdoer; the nature of the plaintiff's injuries (whether they are speculative or determinable); and the risk of duplicative recoveries or complex apportionment of damages. *See id.*

Application of these factors to plaintiff's situation leads ineluctably to the conclusion that plaintiff is not in a position to sue these defendants for antitrust violations. The question is not a close one, although plaintiff makes a modest effort to characterize it as one. As the undisputed facts show, it is only in the most generalized fashion that the manipulation of the futures market can be said to affect the cash markets. That there is some effect is undisputed. What that effect might be in any particular transaction is another matter altogether. The number of exchange- based pricing formulas, the laws of supply and demand and the premiums and discounts that reflect supply and demand make it exceedingly difficult, if not impossible, to trace the influence of the futures prices. The physical copper market and the copper futures markets do not move in lockstep. As a consequence, there is only an attenuated causal connection between the harm to plaintiff and defendants' violation; the alleged injury is not a direct one.

Moreover, plaintiff's theory of recovery rests on extraordinarily complex damage computations and a high risk of duplicative recovery, in violation of the principles espoused by the Supreme Court in *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977), and *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968). In *Illinois Brick*, the defendants were manufacturers of concrete block that had engaged in price fixing. Plaintiffs were governmental entities that had purchased buildings built by general contractors, who in turn had bought the block from the manufacturers; plaintiffs were not the direct purchasers of the overly expensive concrete blocks, as they might have been under a different building arrangement. The question for the

Court was whether indirect purchasers such as plaintiffs should be able to sue in such a situation. Earlier, in *Hanover Shoe*, the Court had held that a manufacturer charged with violating the antitrust laws could not use as a defense the fact that the plaintiff customer had passed on illegal overcharges to its own customers. As the Court noted in *Illinois Brick*, in rejecting the passing on defense in *Hanover Shoe*, it had been unwilling "to complicate treble-damages actions with attempts to trace the effects of the overcharge on the purchaser's prices, sales, costs, and profits, and of showing that these variables would have behaved differently without the overcharge." *Illinois Brick*, 431 U.S. at 725, 97 S.Ct. 2061. In addition, the Court had been concerned that "unless direct purchasers were allowed to sue for the portion of the overcharge arguably passed on to indirect purchasers, antitrust violators 'would retain the fruits of their illegality' because indirect purchasers 'would have only a tiny stake in the lawsuit' and hence little incentive to sue." *Id.* at 725-26, 97 S.Ct. 2061 (quoting *Hanover Shoe*, 392 U.S. at 494, 88 S.Ct. 2224).

*Illinois Brick* forced the Court to decide two questions: whether it should apply the rule announced in *Hanover Shoe* equally to plaintiffs and defendants and whether it had reached the right conclusion in that case when it held that it was only the overcharged direct purchaser that was the party "injured in his business and property" within the meaning of § 4 of the Clayton Act, rather than others in the chain of manufacture and distribution. It answered yes to both questions. The rule announced in *Hanover Shoe* operated to bar plaintiffs from using the passing on theory offensively, that is, by arguing that they had been injured by the general contractors' passing on to them of the overcharge on the concrete blocks, and the

rule enhanced the effectiveness of the antitrust treble-damages action by precluding indirect purchasers down the distribution chain from suing to recover the fraction of the overcharge allegedly passed on to them. *See Illinois Brick*, 431 U.S. at 728-29, 97 S.Ct. 2061.

Two policy concerns animated the Court's decision in *Illinois Brick*: the transformation of "treble-damages actions into massive multiparty litigations involving many levels of distribution and including large classes of ultimate consumers remote from the defendant," *see id.* at 745, 97 S.Ct. 2061 and the enormity of the task that courts would face in attempting to determine damages incurred at each level of distribution. *See* Phillip E. Areeda & Herbert Hovenkamp, II *Antitrust Law* p 346c (Rev. ed. 1995) ("The point to be drawn from *Illinois Brick* and its predecessor, *Hanover Shoe*, is the practical one that the effectiveness of the antitrust remedy would be undercut if the task of tracing antitrust injuries and determining damages becomes overly complex.").

Even when the damages calculation is not complex, the Court has refused to waver from its position that the purchaser that buys directly from the alleged antitrust violator is the only party that can assert antitrust standing. In *Kansas v. UtiliCorp United, Inc.*, 497 U.S. 199, 110 S.Ct. 2807, 111 L.Ed.2d 169 (1990), for example, the Court refused to recognize antitrust standing for customers of utility companies, despite the fact the utility companies had passed on to those customers 100% of the alleged overcharges for gas. The Court acknowledged that the economic assumptions underlying *Illinois Brick* might not apply with equal force in all cases and might even be disproved in a particular case, but confirmed its belief that "ample justification exists for our

stated decision not to 'carve out exceptions to the [direct purchaser] rule for particular types of markets.' *Illinois Brick*, 431 U.S. at 744, 97 S.Ct. 2061. The possibility of allowing an exception, even in meritorious circumstances, would undermine the rule." *UtiliCorp United*, 497 U.S. at 216-17, 110 S.Ct. 2807.

Plaintiff Ocean View has not alleged that it bought more than a relatively tiny percentage of copper cathode or copper rod from one of the defendants. It has adopted a different approach, which is to argue that the wrongdoing of the defendants had as its object the manipulation of prices on the futures market that served as the index for prices on the physical market. Because copper cathode is the only form of copper that is the subject of futures contracts and because defendants concentrated their efforts to manipulate the physical market for copper by stockpiling huge supplies of copper cathode and not raw copper or concentrate, plaintiff argues that the relevant "market" for antitrust purposes is the copper cathode market. This market definition is purposeful. By limiting the antitrust focus to the copper cathode market, plaintiff can call itself the "first purchaser" in the market. As the first purchaser, it contends, it was directly injured by the manipulation of prices for copper cathode and thus has standing to sue any supplier that made its own cathode. It avoids the *Illinois Brick* concern of duplicative recoveries because it is the first entity to pay an overcharge tied to copper cathode prices, as contrasted with purchasers of pre-cathode copper. Each time that plaintiff bought cathode or rod in the relevant market during the period of defendants' manipulation, it had to pay a higher price for copper cathode or rod than it would have paid had it not been for defendants' manipulation of the futures markets in copper cathode.

Plaintiff agrees that it cannot be deemed the first purchaser when it bought cathode from suppliers that had not made the cathode themselves. In that circumstance, it concedes, its purchase of the cathode would not be the first time the cathode had been sold; therefore, plaintiff would not be entitled to damages as the first purchaser.

Plaintiff maintains that the first purchaser of a product at a manipulated price is the equivalent of a direct purchaser because it is the first to feel the effects of the conspirators' efforts to manipulate the prices of the product. Such a purchaser is best positioned to assert antitrust claims resulting from the conspirators' actions. Moreover, plaintiff argues, it makes no difference to the assertion of standing that it would be difficult to prove exactly how much of the cathode plaintiff purchased had not been the subject of a previous purchase by the supplier because the quantities can be estimated. Plaintiff does not say exactly how the estimate would be made. Presumably, plaintiff would determine for any given year (or other time period) how much cathode Supplier A made and how much Supplier A bought from other suppliers and then apply the percentage of purchased cathode to the percentage of cathode Supplier A sold to plaintiff in that year. This would produce an estimate of the amount of cathode plaintiff bought from Supplier A in a given year that had never been purchased before. Plaintiff admits that it has no evidence at the present time that would enable it to make these estimates but denies that this is any problem. Its discovery to date has been limited to standing only; when the discovery limits are lifted, it says, it will subpoena the evidence it needs from its suppliers.

The flaws in plaintiff's theory are manifold. First, there is no support in the case law for plaintiff's theory of the first purchaser as the equivalent of the direct purchaser under *Illinois Brick*. In all probability, plaintiff is trying to adapt its claim to the concept of "umbrella standing" relied upon in *Sanner v. Board of Trade*, 62 F.3d 918 (7th Cir.1995). In *Sanner*, individual soybean farmers sued the Chicago Board of Trade, alleging that the board had violated the antitrust laws by passing a regulation requiring holders of long term positions in soybean futures to liquidate them according to a specified schedule, as a means of bringing down the cash price of soybeans. The farmers alleged that they had suffered injury when they tried to sell their soybean crops because of the board's action, which had depressed the price of soybeans. The court of appeals held that the district court had acted prematurely in dismissing the farmers' claim. The district court had held that the cash and futures markets were distinct markets; the farmers had not participated in the futures markets; the causal link between the cash value of soybeans and the manipulation of the futures market was too attenuated; the nature of the damages was too speculative; and other persons might in a better position to sue. The court of appeals disagreed with these holdings, finding the farmers' allegations sufficient to withstand a motion to dismiss. As to the alleged distinctions between the cash and futures markets, the farmers had alleged both that the board had acted with the intent of prompting a downturn in the cash market for soybeans and that the two markets moved in lockstep because they involved the same commodities to be delivered immediately or sometime in the future. As to damages, the court of appeals was satisfied that the damages calculation would not be particularly difficult: "Both parties can offer proof concerning the extent to which a decline in the cash

market price of soybeans (an objectively verifiable matter) was or was not attributable to the liquidation of positions prompted by the [board of trade's] Resolution." *Id.* at 930.

*Sanner* does not provide support for plaintiff's assertion of standing, now that the record has been developed and the case is before the court on motions for summary judgment. *Sanner* was decided on a motion to dismiss. At that stage, it was proper to accept the plaintiff farmers' allegation that the cash and futures soybean markets moved in lockstep. (For the same reason, it was proper to accept plaintiff's allegation in this case that "a manipulation of the price of copper futures on the COMEX and/or the LME would directly and predictably correlate with a manipulation of copper prices on the cash market," Plt.'s Am.Compl., dkt. # 155, p 21, when deciding defendants' motion to dismiss the complaint. *See In re Copper Antitrust Litigation*, 98 F.Supp.2d at 1050.) It was evident, however, that the plaintiffs in *Sanner* would be unable to succeed on their claim if they could not prove their allegations about the way in which the markets worked. In this case, the undisputed facts show that the relationship between the futures market and the physical market is not direct and predictable; many factors other than the futures prices enter into the price calculations for physical copper. *Cf. In re Beef Industry Antitrust Litigation*, 710 F.2d 216 (5th Cir.1983) (on motion to dismiss, allegations of "rigid formula pricing" tied to daily reports of beef prices sufficient to proceed; on motion for summary judgment, defendants' "overwhelming proof," *id.* at 219, that factors other than daily price reports influenced beef pricing and plaintiffs' failure to raise genuine issue in response supported grant of summary judgment for defendants); *In re Coordinated Pretrial Proceedings in*

*Petroleum Products Antitrust Litigation*, 691 F.2d 1335 (9th Cir.1982) (risk of double recovery and unacceptable level of speculation and complexity of damages calculation doomed retail gasoline purchasers' assertion of umbrella standing when purchasers bought from non-defendants).

It is telling that plaintiff ignores the obvious problem of characterizing the market as a cathode market, when the undisputed facts show that rod is made from cathode. Therefore, any time plaintiff bought rod rather than tolling it, it was buying previously purchased cathode that had been turned into rod. Because most of its purchases were of rod, plaintiff's "cathode market" theory is not even relevant to its situation.

Even if, as plaintiff argues, it is entitled to sue because it was injured directly by defendants' antitrust violations on each occasion that it bought copper cathode or rod at a price tied to the metals exchanges, it must show that allowing it to do so would not result in duplicative recovery or an overly complex determination of damages. It cannot make such a showing. Plaintiff has the initial challenge of showing that it was the first purchaser of copper cathode. As it has conceded, in many instances it could not make this showing. It bought regularly from suppliers such as traders and semi-fabricators that had to purchase copper cathode for sale to plaintiff because they had no facilities for making their own.

Even when plaintiff bought from producers, it could not be sure that the producers were selling their own product or purchased product. Plaintiff has no documentation to prove the source of any copper cathode it purchased or any evidence from which it might estimate what percentage of the

cathode it purchased had been purchased previously. It is no answer for it to say that such evidence can be obtained in the future or that it need not be produced at this time because it relates only to damages. The missing evidence is critical to plaintiff's assertion of standing, since among the elements of antitrust standing it would have to prove at trial are that a damage calculation would not be impossibly complex and that it would be possible to determine plaintiff's damages without duplicating the damages of any other potential plaintiff. On a motion for summary judgment, the party opposing the motion must reveal its hand. It must adduce evidence sufficient to create a genuine issue as to each material fact; it cannot resist the motion simply by suggesting it will have controverting evidence at trial. *See, e.g., Schacht v. Wisconsin Dept. of Corrections*, 175 F.3d 497, 504 (7th Cir.1999).

Of course, this missing evidence is only one of many problems plaintiff has. Even with the evidence that would allow it to estimate what percentage of copper cathode it bought "first," estimations would not solve the more intractable problem of determining the overcharge that plaintiff paid in any given transaction. As I understand plaintiff's theory of computing damages, plaintiff would begin with an estimate of the percentage of copper cathode and rod it bought in a given time period and then attempt to disentangle the factors that went into the purchase price of that copper to determine the portion that was the result of illegal manipulation. If this is the damage calculation process, it leaves unanswered a myriad of questions. What price would plaintiff use as its starting point? Would it take an average price paid for all the copper over the time period (since it could not know as to any given day or any particular

transaction whether the cathode it was buying had been purchased previously)? If so, how could it trace an average price to any indexed price, when the indexed prices on the Comex alone change from day to day and include 24 variations each day? The difficulty, if not the absurdity, of trying to calculate damages is obvious.

Not only is the damage calculation the kind that *Illinois Brick* and *Hanover Shoe* have ruled inimical to the policies underlying the antitrust laws, any damages awarded to plaintiff would inevitably be duplicative of damages due others. There is no way to determine which cathode should be considered a "first purchase." Because there is not, there is no way to determine whether another player in the copper market might be entitled to damages for having paid a higher price on the same copper. There is no simple or straightforward way to analyze a particular purchase price and determine whether it represents an overcharge attributable to defendants' manipulation or the seller's passing on of the original overcharge, with perhaps a second overcharge resulting from indexing the second sale to the futures market. As in *In re Copper Antitrust Litigation* (*Loeb Industries v. Sumitomo Corp.*), 196 F.R.D. 348, 357 (W.D.Wis.2000), "the complexities of the copper transactions in which plaintiffs engaged made it ... difficult to determine whether they ... were injured directly by defendants' antitrust violations and not just by the passing on of prior overcharges tied to the futures market."

*Sanner*, 62 F.3d 918, provides no help to plaintiff in this regard. In *Sanner*, the plaintiffs were in fact the first line of persons injured: presumably they had grown the soybeans that were the subject of the price manipulation. There was no

evidence that they were selling soybeans they had purchased from others or that they were re-selling beans to other farmers (at indexed prices) who were also seeking damages for the price manipulation.

The availability of hedging and its wide use are other reasons to find that plaintiff was not the first to incur injury because of manipulation of the futures prices for cathode. (It is worth noting that in *Sanner*, the court never discussed the possibility of hedging and its effect on plaintiffs' assertion of umbrella standing, although it is a common practice in all commodities markets.) The routine use of hedging by suppliers of cathode and other copper products means that most of the copper that was sold to plaintiff had been the subject of a hedge. Assuming that plaintiff's allegations are correct and that defendants were manipulating the futures markets throughout this period, the market price at which a supplier hedged its future sales of copper would have been an artificial one that caused the supplier injury long before it shipped copper to plaintiff. To the extent that the supplier passed on the artificial price, plaintiff's damages would be duplicative of its supplier's, who could assert its own claim for overcharges on the same copper. In fact, several of plaintiff's suppliers have done just that in the lawsuits filed in California against defendants Sumitomo Corporation of America, Campbell and Global and have recovered money on their claims. Plaintiff argues that the California lawsuits are separate matters, based on different claims and brought under a wholly different law that allows recovery up and down the distribution chain. Whether or not plaintiff is correct about the lack of overlap between this suit and the California ones, the fact remains that allowing plaintiff to sue for damages that might have been incurred by others higher up the distribution

chain violates the *Illinois Brick* and *Hanover Shoe* rule denying standing in situations in which there is a serious risk of multiple liability. More important, the assertion underscores the difficulty of unraveling the tangled skein of copper transactions to determine the source of the copper and how the purchase price was derived.

At the outset of its brief, plaintiff expressed concern that if it were not granted standing, no potential plaintiffs could sue unless they "could prove to a mathematical certainty that whatever copper cathode they purchased contained only copper that their vendor itself mined," Plt.'s Mem. in Response, dkt. # 384, at 1, and that if defendants' view is adopted by the court, defendants would have found "the perfect, victimless, crime, or at the very least, a crime whose victims are without remedy." *Id.* at 4. It is true that courts are to take into consideration the existence or non-existence of more direct victims who can assert a claim against a wrongdoer, *see Associated General Contractors*, 459 U.S. at 540-41, 103 S.Ct. 897, but that is only one of the factors to be weighed in the balance. In itself, it is not sufficient to provide standing if the other factors do not point toward the same conclusion. In any event, other plaintiffs do exist. They include not only the entities who are part of the class action in federal court in New York, but presumably those who bought copper directly from defendants at a supracompetative price.

Plaintiff is not suing to recover on that basis, even though it did buy copper directly from defendant Sumitomo Corporation of America at one period in 1992. It has never based any demand for relief on direct sales from Sumitomo.

I conclude that plaintiff has not adduced evidence sufficient to create a genuine issue that it has antitrust standing to sue defendants. Therefore, I will grant defendants' motions for summary judgment and deny plaintiff's. With this determination, it is unnecessary to address the Morgan defendants' motion to dismiss plaintiff's complaint for failure to state a claim under Fed.R.Civ.P. 12(b)(6) on the ground that plaintiff failed to allege that these defendants participated directly in any transaction in violation of the antitrust laws.

Plaintiff's state law claim under Rhode Island law fails for the same reasons as the federal law claim because the Rhode Island Antitrust Act is "construed in harmony with judicial interpretations of comparable federal antitrust statutes insofar as practicable, except where provisions of this chapter are expressly contrary to applicable federal provisions as construed." R.I.Gen.Laws s 6-36-2(b). Nothing in the Rhode Island antitrust laws is contrary to the Supreme Court's interpretation of the Sherman Act in *Illinois Brick*, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977).

Plaintiff has asked that its state law claim be dismissed without prejudice but it has offered no argument to support its request or cited any provision of Rhode Island case law or statutes that would suggest that the state's laws are construed differently from federal laws with respect to antitrust standing. There is no reason to allow this matter to proceed in state court when there is no apparent basis on which it could succeed.

Before ending this opinion, I want to comment on the excellence of the briefing and the presentation of the proposed findings of fact. It is not often that courts have the pleasure

of working with such well prepared materials. Counsel are to be commended for their work.

ORDER

IT IS ORDERED that the motion for summary judgment of plaintiff Ocean View Capital, Inc., f/k/a Triangle Wire & Cable, Inc. is DENIED; the motions for summary judgment filed by defendants Sumitomo Corporation of America, Sumitomo Corporation, Sumitomo Futures Corporation, Global Minerals and Metals Corporation, David Campbell, Credit Lyonnais Rouse, J.P. Morgan & Co., Incorporated, and Morgan Guaranty Trust Company of New York are GRANTED on all of plaintiff's federal and state claims; and the motion to dismiss filed by defendants J.P. Morgan & Co., Incorporated and Morgan Guaranty Trust Company of New York is DENIED as moot. The clerk of court is directed to enter judgment for all defendants in cases 99-C-0801-C and 00-C-0528-C and close these cases.

Entered this 23rd day of July, 2001.

BY THE COURT:

BARBARA B. CRABB
District Judge

## APPENDIX D

**UNITED STATES COURT OF APPEALS**
**FOR THE SEVENTH CIRCUIT**
**Chicago, Illinois 60604**

**Nos. 99 C 801, 00 C 528 & 99 C 621**

**[Filed January 30, 2003]**

Before

Hon. Richard D. Cudahy, *Circuit Judge*
Hon. Ilana Diamond Rovner, *Circuit Judge*
Hon. Diane P. Wood, *Circuit Judge*

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Nos. 01-3229 & 01-3230 )
)
OCEAN VIEW CAPITAL, INCORPORATED, )
formerly known as TRIANGLE WIRE & )
CABLE, INC., )
Plaintiff-Appellant, )
)
v. )
)
SUMITOMO CORPORATION OF AMERICA, )
SUMITOMO CORPORATION, GLOBAL )
MINERALS AND METALS CORPORATION, )
et al., )
Defendants-Appellees, )

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No. 01-3485

VIACOM, INC. as successor by Merger to CBS CORP. (F/K/A WESTINGHOUSE ELECTRIC CORP.), AND EMERSON ELECTRIC CO.,
Plaintiffs-Appellants,

v.

GLOBAL MINERALS AND METALS CORPORATION AND CREDIT LYONNAIS ROUSE, LTD.,
Defendants-Appellees.

Appeals from the United States District Court for the Western District of Wisconsin

**Barbara B. Crabb,** Chief Judge.

**ORDER**

On consideration of the petitions for rehearing and petitions for rehearing *en banc,* no judge in active service has requested a vote* on the petitions for rehearing *en banc* and all of the judges on the original panel have voted to deny the petitions for rehearing. It is, therefore, ORDERED that these petitions for rehearing and rehearing *en banc* are DENIED.

* Chief Judge Joel M. Flaum did not participate in consideration of these petitions.